

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONATHAN A. BORDEN and
AMY P. BORDEN,
Plaintiffs

v. CIVIL ACTION NO. 04-175 ERIE

AMICA MUTUAL INSURANCE
COMPANY,
Defendant

NON-JURY TRIAL - DAY NO. 3

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Monday, December 12, 2005.

APPEARANCES:

CRAIG MURPHEY, Esquire, appearing on behalf of
the Plaintiffs.

PAUL K. GEER, Esquire, appearing on behalf of

Ronald J. Bench, RMR - Official Court Reporter

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1 I N D E X

2 WITNESSES: DIRECT CROSS REDIRECT RECROSS

3 FOR THE PLAINTIFFS:

4 David J. Haller 3 17 -- --

5
6 FOR THE DEFENSE:

6 Daniel J. Jones 32 47 57 61

7 David J. Bennett 64 80 85

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9 - - -

10 EXHIBITS: IDENTIFIED

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 9:00 a.m., on

4 Monday, December 12, 2005, in Courtroom C.)

5

6 THE COURT: All right, where were we witness wise?

7 MR. MURPHEY: We're going to call David Haller.

8 THE COURT: Raise your right hand.

9 DAVID J. HALLER, PLAINTIFFS' WITNESS, SWORN

10 DIRECT EXAMINATION

11 BY MR. MURPHEY:

12 Q. Good morning, Mr. Haller.

13 A. Good morning.

14 Q. Thank you for coming today. Can you please tell us your
15 occupation?

16 A. I'm a general contractor engaged in the construction and
17 remodeling of single family, light commercial, residential and
18 agricultural buildings.

19 Q. Where is your business located?

20 A. My office is located at 4845 West Lake Road.

21 Q. In Erie?

22 A. Erie, Pennsylvania. My mailing address is 4241 Neptune
23 Drive, which is my residence.

24 Q. How many years have you been a builder/remodeler?

25 A. I've been in my own business 25 years, which is September

1 19, 1980. And before that I was engaged in the construction

2 business, heavy and highway, I was an estimator for about 10

3 years. Before that I worked as a laborer in a sewer gang

4 building manholes.

5 Q. You said that you were an estimator?

6 A. Yes.

7 Q. For who?

8 A. Milano Construction Company. That's where I learned the

9 estimating business.

10 Q. You told us a little bit about the type of work that you

11 do, do you commonly become involved in what I would call

12 high-end residential construction here in the Erie area?

13 A. Yes.

14 Q. What does high-end mean to you?

15 A. To me high-end construction is -- if you want to talk

16 about size, you could talk about anything over 4,000 to 5,000

17 square feet, that's new construction. If you're talking about

18 remodeling, anything about \$250,000 in the remodeling end. If

19 you're talking new houses, you're talking anywhere between --

20 five and a million dollars. I hope that defines that for you.

21 Q. This trial is about the Borden house on Wolf Road in

22 Erie; are you familiar with that house?

23 A. I'm very familiar with the house.

24 Q. Can you describe for the record a little bit about the
25 Wolf Road area?

5

1 A. Well, it's a nice neighborhood. It's probably one of
2 Erie's premiere neighborhoods. I've remodeled and built a
3 number of projects in the area.

4 Q. How many projects do you think you've been involved in
5 over the years in the Wolf Road area?

6 A. A lot. I'll define it, I can name them or I can tell you
7 10.

8 Q. Ten, maybe more than 10?

9 A. Probably more than 10.

10 Q. Is that both building and remodeling?

11 A. Correct.

12 Q. You defined for yourself high-end construction or
13 high-end homes, would the Borden's house fit that definition?

14 A. Yes.

15 Q. You said that you --

16 A. Can I clarify, also?

17 Q. Sure.

18 A. The finishes, you know the materials, that are used in
19 the high-end projects are more expensive and more
20 discriminating than one would find say in a, to use an extreme,
21 a modular home.

22 Q. You said that you have worked on a number of homes in the
23 Wolf Road area, did that include houses that are very close in
24 proximity to the Borden's house?

25 A. Yeah. Right, the ones I can tell you, we remodeled the

6

1 Roger Taft home. We remodeled the Michael Victor home, the
2 Frank Victor home. Those are the ones that are closest. We
3 built several new homes in the area. I just completed a home
4 for David Hallman in the \$800,000 range.

5 Q. In the Wolf Road area?

6 A. In the Wolf Road area. I could name you five or six
7 others.

8 Q. The remodeling projects, are they large remodeling
9 projects?

10 A. Yes. I think the Roger Taft project would be the
11 largest, it was an extensive, 50 percent increase in the size

12 of his home. Matching the slate roof, all kinds of very nice
13 things we did there.

14 Q. Were you ever involved with the Borden house in
15 particular before this fire?

16 A. I put a kitchen in the house when it was not owned by the
17 Bordens. I believe -- I never can remember when I did it. But
18 I'll tell you it was prior to their ownership.

19 Q. You described your years of experience as a builder and
20 remodeler in the Erie area, are you involved in any building
21 organizations or other professional organizations?

22 A. Yeah, I'm in the Builder's Association of Northwestern
23 Pennsylvania. I was president of the Builder's Association in
24 1992. I'm one of two people in Erie who owns the certified
25 graduate remodelers degree.

1 Q. What does that mean, how do you get that certification?

2 A. I have gone and attended classes, it's like a continuing
3 education.

4 Q. Do you have experience in estimating the extensive
5 remodeling that might be necessary in a house?

6 A. I've been in the business for 25 years. If you don't
7 know how to estimate, you're dead. I'm a professional
8 estimator, I learned how to estimate, that's how I started the
9 business.

10 Q. Describe how you started, what that was, what were you
11 estimating?

12 A. When I had worked for Milano Construction for seven
13 years, I was the estimator. I estimated anything from
14 earthwork to sewer lines to water lines, to buildings that were
15 associated with heavy and highway work. There weren't a lot of
16 buildings. Of course my estimating experience then expanded
17 when I started building for myself. And, of course, the same
18 principles apply in the estimating business. Whether you're
19 building the World Trade Center or whether you're putting in a
20 sewer line, the same estimating principles apply.

21 Q. You've explained your involvement in the Builder's
22 Association and that you were formerly the president of that.
23 Mr. Haller, are you familiar with the contractors in the Erie
24 area who regularly get involved in either building or
25 remodeling high-end homes?

1 A. Yes.

2 Q. Are you familiar with Brian Seifert and Visions, Inc.?

3 A. I'm only familiar as they pertain to this case. I mean I

4 see, as I stated before, I see his trucks. I believe that he

5 is a fire chaser, excuse me, is a fire restoration contractor.

6 THE COURT: What does that mean a fire chaser?

7 THE WITNESS: A fire chaser is a fire restoration

8 contractor. That is somebody that specializes or regularly

9 works in fire restoration.

10 BY MR. MURPHEY:

11 Q. So is Mr. Seifert's business one that regularly gets

12 involved in rebuilding, building or remodeling high-end homes

13 in the Erie area?

14 A. I never competed against him, I do not think he is.

15 Q. Now, how did you become involved in this particular case?

16 A. I was called by the Bordens and quite frankly I think it

17 was Dr. Borden.

18 Q. And what did he ask you to do?

19 A. He asked me to give him a price on his house. That he

20 had a fire in February, that it was quite extensive, would you

21 come down and take a look -- you know, I'm discussing my

22 options with the insurance company.

23 Q. Were you asked to provide an estimate for putting the

24 house back in its pre-fire condition?

25 A. Yes.

9

1 Q. And what did you do to put together the estimate?

2 A. I called -- well, I walked through the house myself,

3 obviously, did some measurements. We had window guys in there,

4 plumber, electrician, painter -- what I consider to be my key

5 subcontractors who would have the majority of the work, who

6 would perform the majority of the work.

7 Q. Did you have a framing contractor as well?

8 A. Yes.

9 Q. Now, when you inspected the house, what damage did you

10 observe, just generally?

11 A. The place was trashed. It was a very, very bad fire,

12 very hot fire. Very extensive damage. The heat in the house

13 was extensive, in my opinion. I'm talking about windows

14 throughout the entire house that had seal failures. I'm

15 talking about plumbing pipes in the peripheral areas that were
16 shot, melted, damaged, beyond repair. Plumbing fixtures,
17 extensive smoke damage. I later, after investigation, found
18 out that the walls really had to be opened up really to see the
19 extent of the heat. That was the problem, the fire was a very
20 hot fire.

21 Q. And what evidence did you observe in the house that
22 caused you to reach the conclusion that it was a hot fire?

23 A. Well, when the windows are "fried" on the second floor,
24 the pipes showed discoloration and deformation on the second
25 floor, I mean -- when you see heat, a book on a table or a

10

1 carpet on the floor and you lift the carpet up and you see what
2 the heat did and what the protective floor, it doesn't take a
3 lot of effort to really realize that it was a hot fire.

4 Q. Did you notice this evidence of fire residue in areas of
5 the house some distance from where the fire started?

6 A. Yes.

7 Q. What was your understanding of where the fire started?

8 A. Well, it was pretty obvious that the fire started

9 underneath the kitchen. It totally engulfed the kitchen, the
10 floor collapsed, the beams bent like a pretzel. And then the
11 heat and the smoke and everything, of course, extended further.
12 But the entire foundation of the building, the basement, the
13 crawl space, all were pretty much affected. There was a lot of
14 heat down there.

15 Q. Did you notice a smoke odor throughout the house?

16 A. Oh, yeah.

17 Q. Even in areas some distance away from the home?

18 A. I challenge you, I bet if you go out to the hole right
19 where it was bulldozed over, I bet you could smell it.

20 Q. I'm going to show you a copy of an exhibit which was
21 already marked in the case as Exhibit 2-4 -- this is part of
22 Exhibit 2, your Honor, Exhibit 2-4. Mr. Haller, do you
23 recognize that as the estimate, which I think you call it
24 proposal, that you previously did in this case?

25 A. Yes.

1 Q. Mr. Haller, what was your estimated cost of putting this
2 house back in its pre-fire condition?

3 A. My estimate was \$700,000, it says that on page 2.

4 Q. Now, is that a firm price?

5 A. I called it a very, very close ballpark.

6 Q. What does that mean?

7 A. That means plus or minus five, ten percent.

8 Q. And what would cause the plus or minus?

9 A. I did not extensively -- first of all, this was a

10 preliminary estimate, it wasn't a sign the contract estimate.

11 And after this estimate, I would have expected to enter into an

12 agreement with the owners, either we would have proceeded on a

13 cost plus basis or we could proceed on a firm price basis. If

14 we would have proceeded on a firm price basis, I would have

15 solicited a couple more firm prices from key people. I would

16 have gone through the process of picking out materials,

17 surfaces, finishes, and got down to a very detailed analysis of

18 what we were going to do and then make a firm price.

19 Q. But do you believe that this estimate is within five to

20 ten percent of what the ultimate cost would have been?

21 A. I believe so, yes.

22 Q. To put the house in its pre-fire condition?

23 A. I believe so, yes.

24 Q. During the course of this, did you meet a man named

25 Anthony Parise, who was serving as an insurance consultant for

12

1 the Bordens?

2 A. Yes, sir.

3 Q. Did you find him to be knowledgeable and --

4 A. Very excellent man, in terms of his abilities, his

5 knowledge, I learned a great deal from Mr. Parise.

6 Q. Was your estimate influenced in any way by Mr. Parise's

7 own estimate of the damage in this case?

8 A. No, I never knew what his estimate was. I could safely

9 say that, no. I mean -- he and I worked together to determine

10 that the fire, the extent of the fire in the walls, for

11 instance, upstairs was extensive.

12 Q. Why do you say that?

13 A. If you want to call that influenced, he and I did some

14 destructive testing, cut holes in the wall, pulled out the

15 insulation, things like that, different testing.

16 Q. What did you find?

17 A. I found that the walls were smoky, smelly and hot, real

18 hot.

19 Q. You mean behind the wall?

20 A. Behind the drywall, behind the surface finishes of the

21 walls, yes, sir.

22 Q. Now, the original estimate in this case for the insurance

23 company was done by a man named Mr. Schumann. Did you ever see

24 his estimate?

25 A. I never saw his estimate, no. I did hear, you know how

13

1 you hear, I heard his estimate was, what 330 or something, it

2 heard that.

3 Q. Right. Do you find the \$330,000 estimate to be

4 reasonable?

5 A. I laughed at it.

6 Q. Why?

7 A. Well, I'm double that price. I walked in the house, I

8 didn't just walk in there and throw \$700,000 at it, I thought

9 about this price. I had people in. You know, I don't throw

10 numbers out for laughs, I take my business very seriously.

11 Q. You said before that you described the business of fire

12 restoration, you used the word fire chaser and the judge asked

13 you about that. You are familiar that there are fire

14 restoration contractors?

15 A. Yes.

16 Q. Do you know who in Erie commonly work as fire restoration

17 contractors, are you familiar with that industry?

18 A. Yeah, somewhat. I know that Peter Hardner and Sons works

19 in the fire restoration business. My painter, who gave his

20 price to me, has worked extensively for Peter Hardner in the

21 past. There's Al Otteni, I'm not sure how active he is

22 anymore. There is --

23 Q. I'm sorry, go ahead.

24 A. There's maybe one more, but I couldn't name them -- I

25 have to look in the phone book.

14

1 Q. Have you ever heard of Mr. Seifert and Visions working in

2 that field before this case?

3 A. No, not before this case.

4 Q. Have you yourself ever performed repairs to a fire

5 damaged home?

6 A. Yes.

7 Q. About how many times in your career?

8 A. Not many compared to the number of homes that I've done.

9 Not many meaning I've probably done about five fire projects.

10 I am not known as a fire restoration contractor.

11 Q. That's not something that you advertise yourself as?

12 A. I do not.

13 Q. Why not?

14 A. I don't want to be a doctor, I don't want to get a call

15 on Christmas eve.

16 Q. Do you believe that the fact that you don't do a lot of

17 fire restoration work, limited your ability to provide a

18 realistic estimate in this case?

19 A. I don't believe so.

20 Q. Now --

21 A. I mean, you have to understand -- construction is

22 construction. I mean, there's no difference really in

23 demolishing a house and rebuilding it, say a second floor

24 addition, there's no difference in that. You're either taking

25 out dirty, smoky remains or you're taking out clean old

1 remains, the same process. The fact that you're handling
2 smelly, dirty fire-related stuff really doesn't -- I don't
3 think matters.

4 Q. Have you ever gotten involved in a case where a fire
5 restoration contractor might use some technology to clean and
6 seal and repaint a damaged item rather than to replace it?

7 A. Yes.

8 Q. How many times have you been involved in those cases?

9 A. About five times. And my painter, as I told you, I rely
10 on my subs. My painter gave me an extensive look-see at this
11 project. And we talked about the areas of the house that we
12 could save by using the "technology". The technology, unless
13 somebody proves me different, you know, the technology is
14 basically coatings and cleaning. I mean unless somebody has
15 that technology to fix a burned jacuzzi tub, I mean yeah.

16 Q. Did you --

17 A. There's no technology to fix behind the walls. There's
18 no laser beam that you stick next to the wall that pulls the
19 smoke out.

20 Q. Did you incorporate that information, that is what could
21 be cleaned and sealed and deodorized, in your estimate?

22 A. Yeah. I did not detail it, but we talked about that.

23 Q. With the painting contractor?

24 A. Uh-huh. I just refreshed my memory by calling my

25 painting contractor in preparation for this trial. It's

16

1 exactly as I remember it. I'm pretty clear on it.

2 Q. What did he say?

3 MR. GEER: Objection, hearsay.

4 THE COURT: Sustained.

5 BY MR. MURPHEY:

6 Q. In developing your estimate, though, you talked to the

7 painting contractor, is that correct?

8 A. Repeat that, please.

9 Q. In developing your estimate in the first instance, you

10 talked to your painting contractor about what could be done?

11 A. Definitely.

12 Q. All right. Now, there came a time that you met Mr.

13 Jones, actually he's in the courtroom, I don't know if you

14 remember him or not, he was working as a consultant for the

15 insurance carrier in providing them an estimate, do you

16 remember that?

17 A. Yes.

18 Q. Did you take your estimate to that meeting and give it to

19 Mr. Jones or talk to him about what your estimate was?

20 A. I don't think I did, I would never do that.

21 Q. Why wouldn't you do that?

22 A. Well, I considered him a competitor at the time, possibly

23 if he knew my estimate, maybe he might have had a lower

24 estimate and got the work. I didn't think that it was

25 appropriate, it usually is not. But I did meet him, I think we

17

1 showed him through the house, I tried to be cordial. He

2 appeared to be extremely qualified. And I believe he is

3 qualified and he went to work and did a job. We were there

4 simply to help him or to let him in the door.

5 Q. This was an issue raised before, did either Attorney

6 Jones, who you knew was involved in the case for the Bordens,

7 Terry Jones, or the Bordens, did they ever ask you not to give

8 your estimate to anybody else?

9 A. I can't recall. I don't remember that. I don't remember

10 either way.

11 Q. Now, you ultimately demolished the house, is that
12 correct?

13 A. Yes, sir.

14 Q. Did you find any structural problems with the foundation
15 or anything after you demolished the house?

16 A. I can't definitively tell you that I did. But I can tell
17 you that that fire was hot. That block, the foundation was
18 questionable. I cannot definitively show you a test or
19 anything like that, no.

20 MR. MURPHEY: All right, Mr. Haller, thank you very
21 much, I don't have anything else.

22 THE COURT: Mr. Geer.

23 CROSS-EXAMINATION

24 BY MR. GEER:

25 Q. Good morning, Mr. Haller.

1 A. Good morning.

2 Q. Mr. Haller, one detail I think you said in your testimony
3 this morning that you had handled five -- been involved in five

4 cases where fire restoration was done. I believe I asked you

5 at your deposition, you said three; do you recall that?

6 A. I may have said three. If you want to say three, it's

7 been 25 years. The fact of the matter remains, in the scheme

8 of things, I don't do a lot of fire restoration work.

9 Q. You also don't do smoke remediation work, do you?

10 A. No.

11 Q. The easiest way, would you agree with me, that the

12 easiest way to repair a fire damaged property is to tear a

13 building out, back to the walls, the outside walls, and start

14 all over again, correct?

15 A. The easiest way?

16 Q. The easiest way?

17 A. I don't think --

18 THE COURT: Hang on, don't talk over him, wait until

19 he finishes, so this guy can get you down.

20 THE WITNESS: Okay.

21 THE COURT: Start that again, will you, Mr. Geer.

22 BY MR. GEER:

23 Q. Would you agree with me that normally the easiest way to

24 repair a fire damaged structure would be to tear it down, tear

25 down the walls and rebuild the interior; I'm assuming the

1 outside of the house isn't severely damaged?

2 A. Well, the easiest way or -- I think it's a question of
3 integrity. In other words, my take on the situation is given
4 the heat of this particular fire, what did the heat do to the
5 wires behind the walls. What did the heat do to the integrity
6 of the materials behind the walls. The only way you'd ever
7 really know that, in my opinion, is to open up the walls and
8 find that out.

9 Q. Mr. Haller --

10 A. When you say the easiest, do you mean the cheapest?

11 Q. Just in terms of getting it done, isn't it easier to tear
12 it down, if you can tear something down in an hour or so, to
13 clean it, seal it, paint it, spend a lot of time, it takes
14 longer than that, doesn't it?

15 A. I would characterize it as -- the most prudent method,
16 yes.

17 Q. And you indicated in your direct testimony that you are
18 not familiar with any sort of technology which would be able to
19 clean up the inside of a wall, correct?

20 A. Correct, other than coating. I'm familiar with the
21 coatings in the cleaning processes that one would do.

22 Q. Can you provide the court with the names of any of the
23 coating processes that are used?

24 A. No, but my subcontractor could.

25 Q. And they've been successful, in your experience, on three

20

1 to five occasions that they've been used?

2 A. Yes.

3 Q. And when you said you've been involved in fire
4 restoration either three times or five times in your many years
5 of experience, was part of the fire restoration in those cases
6 smoke remediation technology or was there some other aspect of
7 fire restoration?

8 A. It was -- no, I would characterize my knowledge of smoke
9 remediation as being not extensive. I know how it works, but
10 no, I am not an expert in that field. Our estimate was based
11 upon tearing walls down and replacing them. So I think if
12 that's where you want to go, I think that's true.

13 Q. The document that Mr. Murphey showed to you, which was

14 your estimate, was not a line item estimate, correct?

15 A. Please repeat that again.

16 Q. It was not a line item estimate, you didn't go room by

17 room and say how much plywood and how much --

18 A. No, that would have come on a second go round, yes.

19 Q. So, in this particular case, what you did was walk

20 through, take some measurements and gave the Bordens a ballpark

21 number of \$700,000, correct?

22 A. I think it's a little more than that.

23 Q. But you didn't sit down and estimate out room by room,

24 material by material, hour by hour, what type of work it was

25 going to take?

21

1 A. Could I clarify that?

2 Q. Yes, you can.

3 A. Fire restoration contractors and fire insurance companies

4 require that you do go room by room. They require that you

5 take a room and say you're going to do A, B, C, D and E, and

6 put a price to that. Then they tell you that on top of your --

7 they want to know your cost. They usually pay you a profit,

8 usually somewhere in the 20 percent range, 10 percent, meaning
9 10 percent overhead, 10 percent profit. All right. If
10 required, I was prepared to approach that job in that manner,
11 and I was prepared to give that sort of estimate to an
12 insurance company because I know that's what they require. My
13 figure, first of all, was based upon a general line item
14 estimate based on framing the entire house. Based on window
15 replacement, the entire house. Based on drywall, based on
16 painting. In other words, I was breaking down my estimate in
17 my way, not the insurance company's way. I did not just walk
18 into the house and ballpark it, I think that is a wrong
19 characterization. I estimated it very, very closely and did
20 not get into the details necessary to provide a firm estimate.

21 Q. I want to talk a little bit more about your estimate and
22 what you did. You gave it to the Bordens?

23 A. I gave the proposal to the Bordens.

24 Q. I note that you're calling it a proposal rather than an
25 estimate, in fairness, that's exactly what it says, it's a

1 proposal, is it not?

2 A. I believe it is a proposal to do work. The estimate is
3 my property and my property alone. It's what I figure what my
4 business -- it's really a culmination of my business knowledge.

5 Q. So you did not -- did you provide an estimate to the
6 Bordens?

7 A. No, I provided a proposal.

8 Q. So you provided, you made clear here two things --

9 THE COURT: I have this, move on.

10 BY MR. GEER:

11 Q. You have not provided an estimate to anyone, is that
12 correct?

13 A. I provided a proposal to the Bordens, that's all I can
14 tell you. My estimate is part of my internal paperwork.

15 Q. That's your work product?

16 A. That's my work product, right.

17 Q. I'm just trying to make this one point. You never
18 provided an estimate to Amica then, correct?

19 A. No. Not directly, I gave it to the Bordens.

20 Q. Your estimate or your proposal?

21 A. My proposal.

22 Q. I think the court has this, but your estimate is --

23 THE COURT: Mr. Haller, you never provided either a

24 proposal or an estimate directly to Amica, is that correct?

25 THE WITNESS: I do not recall doing that.

23

1 THE COURT: All right, go ahead.

2 BY MR. GEER:

3 Q. To the best of your knowledge, did either the Bordens or

4 Mr. Parise or any of their other representatives, ever provide

5 a copy of your proposal to Amica prior to the day I got it from

6 you in your deposition, which would have been in December a

7 year ago?

8 A. I don't know, I honestly can't remember that. They may

9 have.

10 Q. One more question. Again, I think I asked you in your

11 deposition when you applied or you told me when you applied for

12 demolition permits, do you recall when that was?

13 A. I can tell you that the year of the fire was what year,

14 can I ask you that?

15 Q. 2003?

16 A. We wanted to make -- there would have been a deadline and

17 it might have been a perceived deadline by -- the demolition

18 guy, it was in December of 2003.

19 Q. In your deposition you said you applied for the

20 demolition permit on November 6, 2003?

21 A. Okay, that's fair. We did the work in December.

22 Q. You did the work in December?

23 A. Yeah, that's right. You're right.

24 Q. In other words, they would have decided to demolish the

25 building by November in order for you to apply for the permit

24

1 on November 6th, correct?

2 A. Correct.

3 MR. GEER: That's all I have, thank you.

4 THE COURT: Anything further?

5 MR. MURPHEY: I don't, your Honor.

6 THE COURT: Thank you, Mr. Haller.

7 MR. MURPHEY: Your Honor, the only other witness I

8 have would be by way of deposition.

9 THE COURT: Who is it?

10 MR. MURPHEY: Lisa St. Onge. She was the claim

11 examiner on the case. I have marked as Plaintiffs' Exhibit 14

12 the portions of her transcript that I'd like to put into

13 evidence.

14 THE COURT: All right.

15 MR. MURPHEY: I will not burden the court with

16 reading it.

17 THE COURT: All right.

18 MR. MURPHEY: If that's acceptable?

19 THE COURT: That's fine.

20 MR. MURPHEY: And, your Honor, just by way of

21 housekeeping, I want to make sure the court has copies of all

22 of the exhibits that we have referenced, I would like to move

23 them into evidence.

24 THE COURT: Let's do that now.

25 MR. MURPHEY: Your Honor, Exhibit No. 1 was a photo

25

1 binder.

2 Exhibit No. 2 are packets of the estimates in the

3 case.

4 Exhibit No. 3 was marked claim file exhibits.

5 Exhibit No. 4 were the Amica first party property

6 handling guidelines.

7 Exhibit No. 5 was the insurance policy.

8 Exhibit No. 6 was the diagram of the house. I have

9 a supplement to that exhibit because, your Honor, when we

10 cross-examined the one witness, we wrote on the diagram the

11 names of the rooms that were described on the estimates.

12 THE COURT: All right.

13 MR. MURPHEY: I will offer that up.

14 THE COURT: How was that identified?

15 MR. MURPHEY: It's also Exhibit 6. Do you want me

16 to make this Exhibit 6-A?

17 THE COURT: Make it 6-A.

18 MR. MURPHEY: We did not move Exhibit 7 into

19 evidence.

20 Exhibit 8 was Mr. Bennett's memorandum of April 30,

21 2003.

22 Exhibit 9 is Mr. Seifert's letter of March 7, 2003.

23 Exhibit 10 was the packet of photographs from Mr.

24 Parise or for Mr. Parise's testimony.

25 Exhibit 11 is the undated Anthony Parise letter

1 regarding his response to the Jones' estimates.

2 Exhibit No. 12 is a photograph from the studio room
3 in the house, also called the billiards/study room.

4 Exhibit No. 13 was a photograph of a room in the
5 house, which on Exhibit 6 is called the sewing/den room.

6 And Exhibit 14 are the excerpts from Ms. St. Onge's
7 deposition.

8 THE COURT: Does the deposition transcript of Ms.
9 St. Onge only contain those pages that you went me to read?

10 MR. MURPHEY: Yes, your Honor. Is that acceptable?

11 THE COURT: Yes. Is there any objection to that,
12 Mr. Geer, the way that's coming in?

13 MR. GEER: No, your Honor.

14 THE COURT: All right. Those are all admitted.

15 MR. MURPHEY: Your Honor, I believe that the only
16 thing that I actually physically haven't handed up to you are
17 Exhibits 6A, Exhibit 13 and Exhibit 12.

18 THE COURT: All right. Is that it?

19 MR. MURPHEY: Yes, your Honor.

20 THE COURT: All right, we're going to take a five

21 minute recess.

22 (Recess from 9:35 a.m.; until 9:45 a.m.)

23 THE COURT: Mr. Murphey.

24 MR. MURPHEY: Plaintiff rests, your Honor.

25 THE COURT: All right.

27

1 MR. GEER: Your Honor, at this time I would make a
2 motion for compulsory nonsuit or judgment as a matter of law.
3 The basis for it, essentially, is what the plaintiffs have
4 done -- plaintiffs have attempted to create a bad faith case
5 out of a number of facts which are not really unusual in any
6 insurance matter. Mistakes made in the preliminary estimate,
7 which is done a couple weeks after the loss. Following
8 mistakes made in the preliminary estimate, a meeting was held.
9 At that meeting when Amica did not agree to everything that the
10 plaintiffs wanted them to agree to, it was apparent the two
11 estimates were far apart -- the plaintiffs find, they believe
12 it was wrong for Amica to have requested an appraisal. An
13 appraisal is a contractually mandated provision, which the
14 Bordens agreed to when they obtained their insurance policy.

15 In the interim of all this occurring, Amica had paid
16 everything that they owed as they believed they owed it. They
17 sent checks through March 11th, they sent a check for \$329,000.
18 And, I'm sorry, \$295,000 on a \$329,000 estimate. They paid the
19 actual cash value. Plaintiffs do not submit that that was not
20 an appropriate thing to do at that time, but they rejected it.
21 Another check was sent a few days later for contents. Again,
22 it was rejected. As of the date of this April 15th meeting,
23 there was no -- nearly \$340,000 had been put in the plaintiffs'
24 hand, they rejected it. They had done this despite receiving
25 letters from Amica --

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1 THE COURT: Too fast, Mr. Geer, you've got to slow
2 down a little bit for my court reporter.

3 MR. GEER: They rejected the checks despite
4 receiving letters from Amica saying that these were undisputed
5 payments, they were not intended to settle the claim, they
6 could keep them without prejudice.

7 The appraisal process did not go forward because
8 they obtained counsel. Their attorney, Terry Jones, suggested

9 a couple of things. One of the things he suggested was that
10 prior to going into an appraisal, that Amica try to get a
11 second contractor.

12 The contractor issue is another item which the
13 plaintiffs try to exploit here and turn into a bad faith issue.
14 Essentially, their claim has been that Amica here in hiring
15 Visions, the fire restoration contractor, to do repairs on a
16 high-end house. But in reality, all Amica did was consult with
17 Visions. No one ever pressured the Bordens, nor is there any
18 testimony, that they tried to use the Bordens to do the work.
19 They simply had a fire restoration contractor walk through the
20 site with Mr. Schumann and provide a letter to Mr. Schumann and
21 the Bordens dated March 7, 2003, saying that they could do the
22 work at that price.

23 Mr. Murphey has attempted to put Visions at issue
24 here, he hasn't even called them as a witness. But in reality
25 what happened was, when called into question, Amica decided

1 that rather than push it, rather than continue to make it an
2 issue, they wanted to try to resolve things, so they hired a

3 second contractor, Dan Jones. And after Mr. Jones did his
4 estimate, which was closer in scope to Mr. Parise's, the claim
5 moved forward, it was settled.

6 Bad faith, according to Pennsylvania law, was
7 defined in the Terletsky case, and this was found to be

8 appropriate law in the Third Circuit case of Polselli_v.

9 Nationwide, 23 F.3d 747 (1994). Polselli talks about bad

10 faith, as something which -- a dishonest purpose, meets a
11 breach of non-duty -- through some motive of self-interest or
12 ill-will. Mere negligence or bad judgment is not bad faith.

13 In addition, Polselli held that plaintiffs are required to

14 prove bad faith by clear and convincing evidence.

15 I would respectfully submit to the court that the

16 evidence that we have today falls far short of that statement.

17 For one thing, everything got resolved in the end. What the

18 plaintiffs have attempted to do here was kind of stop time on

19 the April 15th meeting and ignore everything that transpired

20 after that fact. And, in addition, tried to establish that

21 mistakes were not immediately admitted, but instead Amica moved

22 forward with an appraisal process, which was something they

23 were permitted to do under the policy.

24 Therefore, under the law of the state and under

25 Third Circuit, I would respectfully submit that the court enter

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1 judgment in favor of Amica as a matter of law, which is in fact

2 a compulsory nonsuit. Thank you.

3 THE COURT: All right. Mr. Murphey.

4 MR. MURPHEY: Your Honor, I think it's quite obvious

5 at this stage of the proceedings compulsory nonsuit is not

6 appropriate. First of all, the burden of proof is, as Mr. Geer

7 indicated, clear and convincing evidence. But only if two

8 things. One, that Amica's conduct was unreasonable and two,

9 they knew or should have known that that conduct was

10 unreasonable. There is no burden on the plaintiff to prove

11 ill-will or an evil motive. That is the definition of bad

12 faith from Blacks Law Dictionary. But both Pennsylvania case

13 law and federal case law interpreting Pennsylvania law, they

14 have held that is not a requirement on the burden of proof,

15 that the only two things that need to be proved are

16 unreasonableness and whether the defendant knew or should have
17 known that they were acting unreasonably.

18 Judge, you sat very actively listening to the
19 testimony for the last two and a half days, you know very well
20 plaintiffs' position is that Mr. Schumann's original estimate
21 was unreasonably low and the defendant was provided information
22 that it was unreasonably low, Amica failed to act on that
23 information or recklessly disregarded the information that they
24 did develop as of the April 15th meeting. They had Mr.
25 Parise's estimate, which was twice that of Mr. Schumann's.

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1 Mr. Schumann was defending himself by relying on Mr. Seifert.
2 I don't know what they're going to do in their defense case,
3 but Mr. Seifert hasn't testified in this case, there is not a
4 stitch of evidence that he was a competent, reliable
5 restoration contractor, who could be relied on by Mr. Schumann.
6 And they didn't do anything, except for demand an appraisal.

7 It was only after the Bordens then complained to the
8 insurance department and got a lawyer, who, as the record will
9 reflect, accused the defendant of bad faith and threatened a

10 bad faith lawsuit, only then did he say all right, wait a
11 minute, let's go back and get a contractor, which is what they
12 should have done to begin with. And only then did they get a
13 contractor who was reasonable and the case was able to be
14 resolved at that time.

15 So it's not a matter of what Amica did, it's a
16 matter of what Amica didn't do. And that is they ignored the
17 evidence that they had that this was too low, instead of acting
18 appropriately, they, the Bordens, had to take the ball, get a
19 lawyer, call the insurance department, threaten a bad faith
20 lawsuit, only then did Amica do what they were supposed to do.

21 And not to foreshadow the short remarks I might have
22 at closing but, your Honor, if the Amica estimate had been
23 accepted by the Bordens at the time, Amica would have had a
24 windfall of more than \$200,000. Because they would have paid
25 based on the Schumann estimate, even though when they did get

1 the competent contractor to look at it, he, even working with
2 the insurance company, came up with an estimate more than
3 \$200,000.

4 So I think we certainly met our burden of proof with
5 regard to unreasonable conduct in the first instance and
6 knowledge or at least reason to know of unreasonable conduct.
7 Therefore, the nonsuit should not be entered.

8 THE COURT: I'm going to deny the motion. Are you
9 ready to go?

10 MR. GEER: Yes, your Honor. The first witness is
11 Dan Jones.

12 THE COURT: Mr. Jones, raise your right hand.

13 DANIEL J. JONES, DEFENSE WITNESS, SWORN

14 DIRECT EXAMINATION

15 BY MR. GEER:

16 Q. State your full name, please?

17 A. Daniel J. Jones.

18 Q. Mr. Jones, what do you do for a living?

19 A. I'm a fire chaser. I'm in the restoration business. I'm
20 owner and vice president of G.S. Jones & Sons, which is a
21 general contracting and consulting firm that specializes in
22 fire damage repair. And property damage repair in general.

23 MR. GEER: Excuse me, your Honor, just a second.

24 THE COURT: There's a type of chaser on the legal
25 side of the fence that has a more pejorative meaning than fire

1 chaser, I take it that that's just commonly used?

2 THE WITNESS: I've heard it before, it hasn't been
3 used for some time, to tell you the truth. I don't want to say
4 that remodelers and fire restoration contractors are
5 adversarial, but they often see differing points of view.

6 THE COURT: All right.

7 BY MR. GEER:

8 Q. Mr. Jones, could you briefly tell the court your
9 educational background and experience in construction?

10 A. I'm a graduate of Penn State University in the business
11 and finance program. I'm a third generation contractor in a
12 family of contractors. Throughout my high school and college
13 years, I worked various trades in the construction industry,
14 including electrical work, tile setting, carpentry and general
15 labor. After graduation I owned and remodeled and renovated a
16 number of rental units that I had developed. I worked as a
17 carpenter and then I joined -- well, I joined M. Lischner &
18 Son, which is a company my father was involved in, which also
19 specializes in property damage repair. And with M. Lischner &

20 Son, I was the manager of their insulation division. Then I
21 also did estimating and consulting work in the fire damage
22 contracting division. In 1985 my father and I left M. Lischner
23 & Son and started G.S. Jones & Sons, which is a company that
24 also specialized in fire damage repair. My duties there
25 involve estimating, project management, consulting and business

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1 operations. In the last four to five years I've been working
2 almost exclusively in the fee based consulting area. Which
3 means that I primarily investigate and evaluate property damage
4 repair for clients to determine various components of the loss.
5 Over the years I've worked on or consulted on hundreds of
6 residential properties. Some recent projects includes the
7 Ebenezer Baptist Church fire in Pittsburgh. That was a fire
8 where three firemen were killed, four firemen. And it was a
9 \$3.5 million project. I've been spending the last few months
10 evaluating the damage from hurricane Katrina to the state of
11 Mississippi schools for the Travelers Insurance Company in the
12 state of Mississippi. I have a degree or have certification
13 called water loss technician. Which is a certification from

14 the Water Loss Institute, which a division of the Association
15 of Specialists in Cleaning and Restoration. I also have a
16 designation called CR or certified restorer, which is the
17 highest designation that you can achieve with the National
18 Institute of Disaster Repair. Which is also an organization
19 that's an arm of the Association of Specialists in Cleaning and
20 Restoration. I've attended numerous seminars on mold
21 remediation and components, fire damage, water damage, concrete
22 and various building component systems. I provided consulting
23 services on property damage repair throughout the east coast in
24 14 states. I have been qualified as an expert in property
25 damage repair in Erie, Venango County, Beaver County and

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1 Allegheny County. I serve on the judges panel for the Penn
2 State architectural and engineering fifth-year student thesis
3 program. And I was a draft reviewer for the National Institute
4 of Disaster Repair Guidelines for Fire and Smoke Damage Repair.
5 Q. What experience do you have in fire restoration and smoke
6 remediation?

7 A. In smoke remediation my company regularly is involved in

8 the repair, cleaning and restoration of residential, commercial
9 and industrial properties that have been damaged by fire. So,
10 in addition to the consulting services, my company also
11 performs those services, and that includes what we would typify
12 as structural restoration, as well as cleaning and remedial
13 restoration.

14 Q. Are you familiar with the technology and techniques
15 available for the cleaning and restoration of homes which are
16 damaged by smoke?

17 A. Yes, I am.

18 Q. Can you give the court some examples of some of the
19 technology which is available without going into a dissertation
20 that will keep us here all day?

21 A. Okay, you can stop me. Basically, fire or smoke residue
22 is the result of incomplete combustion. When you have complete
23 combustion, the elements are heat, light, carbon dioxide and
24 water vapor. In incomplete combustion, you have those
25 elements, plus you have residue that is different for the

1 different types of fuels that are involved. So, for example, a

2 fire that involves wood and paper products, that's a high
3 oxygen fire that creates a lot of heat, it will deposit a light
4 black soot on various surfaces, it's relatively easy to clean.

5 A smoldering fire of the same types of materials will
6 produce a sticky residue, that is a little more difficult to
7 clean, but is similar in characteristic.

8 A plastics fire, a fire that involves pvc's or plastics,
9 produces a very oily or greasy residue that is much more
10 difficult to remove, especially from porous surfaces.

11 Fires that involves meats or poultries, like if you have
12 a fire in a grocery store or something that involves a kitchen,
13 like a stove top fire, it produces a yellowish greasy film that
14 is more difficult to identify and it has an extremely obnoxious
15 odor.

16 In the restoration industry, there are various chemicals,
17 products, techniques and processes, that addresses each of
18 these different types of soot residue. The general process is
19 really broken down into four primary steps. The first process
20 is the removal of the smoke residue. That can either be done
21 by demolition or it can be done by the cleaning process. In
22 the cleaning process, there's basically three different types

23 of cleaning methods. Mechanical, absorption and solvent. In
24 the mechanical cleaning method, it's primarily through the use
25 of vacuuming, terry-cloth tile wiping, chemical sponges, all

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1 the way from simple vacuuming, all the way up to grit blasting,
2 which might involve the use of typical sandblasting type
3 material where you're removing the residue, plus some of the
4 surface materials. The absorption method is involved where you
5 will use diatomaceous earth or you can use various pastes or
6 materials that you can apply to different types of materials.
7 And the paste or the diatomaceous earth will actually absorb
8 over time the smoke and residue particles. The third method,
9 which is the solvent method, would involve cleaning all the way
10 from using simple water solution up to an acid and pretty much
11 everywhere in between. You're trying to neutralize the PH of
12 the materials because smoke residue can be corrosive and you
13 want to attempt to remove as much of the particles from the
14 surface as possible. The second step in the deodorization
15 process is the use of oxidizers. Oxidizers will typically
16 change the composition of the smoke particles. Those can be

17 either in gas form or liquid form. In the gas form the typical
18 oxidizer that is used is ozone. There is some controversy with
19 regard to ozone and its effectiveness. Basically, what it does
20 is that the molecules that are generated in the ozone process
21 combined with the soot residue, the hydrocarbons in the soot
22 residues, change the chemical composition of that and render
23 them into different materials, like carbon dioxide which is
24 odorless. There's also liquid oxidants, such as chlorine,
25 chlorine dioxide and hydrogen peroxide, which is used in liquid

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1 form. The next method is the application of counteractants or
2 masking agents. Which is really just the process of
3 substituting a pleasant odor for an obnoxious one. In the
4 situation where the residue has been removed and you're left
5 with some remaining residual odor, oftentimes we use
6 counteractants or deodorizers in order to substitute the
7 obnoxious odor for a pleasant one, until the normal odors of
8 the house or business or whatever it might be, eventually takes
9 over the odors from the fire and the counteractants will
10 dissipate. The final step in the deodorization process would

11 be encapsulation. And that can be either using an adhesive
12 type encapsulant, such as unsoot or unsmoke, which are
13 materials specifically designed to encapsulate fire damage
14 residue. Or you can use shellac based products, such as Bins
15 or Bullseye, that are products that have been developed by
16 Zinzer Company, which are specifically designed for fire
17 residue encapsulation. It prevents bleed through and basically
18 what it will do is block the off gassing that is created by the
19 residue. In addition to the various materials that are
20 available for the different types of fire and the different
21 materials that you're working with, there are also application
22 products that are available that are specialized in the
23 industry that allow you to clean sub-wall cavities and duct
24 cavities. And various types of fogging agents that will allow
25 you to fog encapsulants --

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1 THE COURT: Mr. Jones, what do you mean when you say
2 a sub-wall cavity, do you mean behind the plaster?

3 THE WITNESS: Yes. A sub-wall cavity would be
4 either a wall or ceiling surface, and that's the space between

5 two opposing finishes, that would be a cavity of a stud wall or

6 the ceiling joists.

7 THE COURT: All right.

8 THE WITNESS: So, in addition to the products, there

9 are a number of different applications. Such as specialty

10 spray equipment, ULV fogging and thermal fogging.

11 THE COURT: I have another question before you go

12 on. You started out by telling me these are the various

13 approaches to dealing with smoke residue. When you say smoke

14 residue, you mean two components, don't you, soot and smell?

15 THE WITNESS: They're actually one in the same. The

16 smell that you detect when you go into a fire is the result of

17 off gassing of the residue particles.

18 THE COURT: So it's really cleaning the soot, if you

19 will?

20 THE WITNESS: If you've removed a 100 percent of the

21 soot, you've removed the odor.

22 THE COURT: All right, go ahead.

23 MR. GEER: Your Honor, I would move for the

24 acceptance of Mr. Jones as an expert in construction, fire

25 restoration and smoke remediation.

1 THE COURT: First, let me see if he has any voir

2 dire. Do you have any voir dire?

3 MR. MURPHEY: I don't have any voir dire.

4 THE COURT: I accept him as an expert in the field

5 so described.

6 BY MR. GEER:

7 Q. Mr. Jones, based upon your experience, are the various

8 restoration techniques which you have described successful?

9 A. Yes. If they're done in the right order with the right

10 application, yes, they can be highly successful.

11 Q. When we talk about whether it's successful or not, what

12 is the goal of fire restoration?

13 A. The goal of fire restoration is to return the damaged

14 property to its pre-loss condition, without loss in value or

15 function with regard to structural integrity, cosmetic value or

16 use, using the most cost-effective means and the least

17 aggressive method available.

18 Q. Just to clear up one thing. Would you consider it to be

19 a successful fire restoration if the process was complete and

20 the building still had the faintest odor of smoke?

21 A. No, these days we guarantee odor-free restoration
22 projects.

23 Q. When were you called in on the Borden fire loss?

24 A. My call sheet indicates June 20th of '03.

25 Q. Who called you?

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1 A. You did, Paul Geer from the firm of DiBella and Geer.

2 Q. What were asked to do?

3 A. I was asked to provide a report and estimate on the fire
4 damage to the Borden residence that had occurred some months
5 earlier.

6 Q. Did you do an inspection of the Borden home?

7 A. Yes, I did.

8 Q. When did you do it?

9 A. On June 25th of '03.

10 Q. Can you describe the conditions under which your
11 inspection was conducted?

12 A. Yes. It was a sunny day, it was relatively warm. Some
13 months had passed from the time of the original fire loss until
14 the date of the fire. I drove up to Erie with an associate,

15 Mr. John Dimento from my office, to help me to do a take-off on
16 the building. When I got to the site, I met Mr. Parise and Mr.
17 Schumann, and I didn't know the name of the fellow before, I
18 can't remember it now, but the contractor who installed the
19 kitchen cabinets in the residence and done some work there some
20 years previous, I was under the impression it was about 15
21 years before. We talked to them briefly. We discussed some of
22 the elements of the loss and some of the concerns that they had
23 with regard to the damage and differences in opinion. Mr.
24 Parise and Mr. Schumann took me on a tour of the house to show
25 me basically where the fire occurred. What some of the issues

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1 with regard to the property were. And just generally to point
2 out various things, such as a mural on the entry room or in the
3 entry wall, things like that. At that point Mr. Parise and
4 Schumann left John and I. I don't know if they left the site,
5 but I think they had other things to discuss. And John and I
6 continued then and went through and inspected the property. We
7 were able to get through into pretty much every area of the
8 home. We photographed it. We documented various components

9 and types of damage. Then we left later that evening.

10 Q. Did you prepare an estimate?

11 A. Yes, I did.

12 Q. Is this a copy of your estimate?

13 A. It is.

14 MR. GEER: I'd mark this as Exhibit C.

15 BY MR. GEER:

16 Q. Mr. Jones, what was the amount of your preliminary
17 estimate?

18 A. \$542,598 and some cents.

19 Q. Was this later revised?

20 A. Yes, it was.

21 Q. What number was it later revised to?

22 A. It was increased by \$13,198, to a total of \$555,797.

23 Q. When you did your estimate, did you consider the
24 alternatives you had in terms of smoke remediation, fire work
25 remediation and that type of thing?

1 A. Yes, I did.

2 Q. What ultimate decision did you make in terms of preparing

3 your estimate as to what component parts you were going to

4 replace in the house?

5 A. Well, the biggest decision that I made was to a large

6 degree replace many of the components as opposed to attempt to

7 clean and restore.

8 Q. What was your reason for doing that?

9 A. Well, there were a number of things that led me to that

10 conclusion. First of all, the house appeared to be in

11 excellent condition prior to the loss, with good quality

12 materials. The second thing was is that I was made aware of

13 the fact that the Bordens had a handicapped child that was

14 living in the residence that had some degree of respiratory

15 problems. The home had been remodeled for handicap use. The

16 fire did appear to be widespread and a hot fire. And the loss

17 at that point -- there were two attorneys involved, there were

18 two adjusters involved, there were two estimates present, and

19 there was the potential for litigation. And at that point

20 there was some degree of contentiousness with regard to the

21 estimate and final repair.

22 Q. Did you review the estimate which had been provided by

23 John Schumann?

24 A. Yes, I did.

25 Q. Why did not your estimate follow Mr. Schumann's approach?

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1 A. My approach -- I'm going to basically discuss the concept
2 of cleaning, which was in Mr. Parise's estimate, versus
3 replacement, which was in my estimate.

4 THE COURT: You said which was in Mr. Parise's
5 estimate, did you mean Mr. Schumann's estimate?

6 THE WITNESS: I mean Mr. Schumann's estimate, that's
7 correct. As I said before, the primary objective, the primary
8 job of the estimator is to return the property to its pre-loss
9 condition without loss of value or use. By using the most
10 cost-effective and least aggressive methods possible. That
11 would involve an estimator primarily using -- well, could you
12 repeat the question, I kind of got off track there.

13 BY MR. GEER:

14 Q. Let me put the question to you this way. Did you review
15 Mr. Schumann's estimate?

16 A. Yes.

17 Q. In your opinion was the approach used by Mr. Schumann a

18 reasonable one, assuming that the goal was to restore the house
19 to its pre-fire condition?
20 A. Okay. As far as restoring the house to its pre-fire
21 condition, I had talked about what that goal is. And it really
22 essentially means to restore it without loss in value or
23 function or use, and to do it in the most cost-effective and
24 with the least aggressive means possible. I do believe that
25 Mr. Schumann's estimate was reasonable from the standpoint that

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1 when an estimator goes in initially to a fire loss, he should
2 estimate only those items that he knows is going to be required
3 to accomplish those goals. In just about every fire loss there
4 are unknowns. And with regard to those unknown items, the
5 estimator should either leave them as open, which means they
6 have a zero value, or they should be addressed in the least
7 aggressive manner possible or reasonable. And then once the
8 restoration process starts and the initial demolition is done,
9 then the process of testing, of inspections and evaluation of
10 those remaining questionable items can be accomplished and
11 final decisions can be made. And, quite honestly, that process

12 continues throughout the entire restoration. In doing that,
13 what you do is that you accomplish the goals of restoring the
14 property using the most cost-effective means and the least
15 aggressive methods. So from that standpoint it was a
16 reasonable approach. It certainly was not a complete estimate.
17 There were mistakes that I noted in the estimate. But from the
18 standpoint of approach, clean versus replace, it was a
19 reasonable first approach.

20 Q. Is it reasonable to believe that many of the items that
21 you replaced in your estimate could have been successfully
22 cleaned and deodorized?

23 A. Yes.

24 Q. Would you give us an example of some of the things that
25 you may have replaced in your estimate which Mr. Schumann was

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1 going to clean and deodorize that might have fallen into that
2 category?

3 A. Right. When I developed my estimate, as I said before,
4 we were some months down the road, there were attorneys
5 involved, there was two estimates, there seemed to be an

6 irreconcilable difference between those two estimates. So my
7 goal was to provide an estimate that essentially included no
8 open items and no questions. I wanted to be very conservative
9 in my approach as to what items I saved and what items I didn't
10 save. There's a likelihood that some of the cabinetry could
11 have been cleaned and restored. There's a likelihood that some
12 of the walls could have remained and been deodorized. There's
13 the possibility that some of the plumbing fixtures could have
14 been salvaged and cleaned. And there's a possibility that some
15 of the windows that I had estimated for replacement could have
16 been cleaned and restored.

17 Q. You characterized what you did as having a conservative
18 approach, can you explain to the court what you mean by
19 conservative approach?

20 A. With a conservative approach, I mean that I wanted to
21 develop an estimate that had no open items. Which means that
22 if I had a question about an item, that I would take the
23 conservative approach of replacing it. I also did not want to
24 be in a position where I had less than a high degree of
25 certainty that the processes and the repairs that I recommended

1 would be entirely successful.

2 Q. The judge asked you a question earlier about the comment
3 you made in your earlier testimony regarding the cleaning of
4 sub-wall cavities. In most cases can sub-wall cavities be
5 successfully cleaned, sealed and deodorized?

6 A. It depends on the material, depends on the sub-wall
7 cavity and conditions present. But yes, we deodorize sub-wall
8 cavities in our work process on a regular basis.

9 Q. Has your company successfully repaired and remediated
10 smoke damaged housing using the technology contemplated in the
11 Schumann estimate?

12 A. Yes, we do that everyday. We use the techniques that
13 I've talked about here. We've used cleaning and restoration
14 techniques that have been developed through the various
15 organizations over time. And we're very successful at it.

16 Q. Are all the opinions you have offered here today
17 expressed within a reasonable degree of certainty?

18 A. Yes.

19 MR. GEER: Thank you.

20 THE COURT: All right, Mr. Murphey.

21 MR. MURPHEY: Thank you, your Honor.

22 CROSS-EXAMINATION

23 BY MR. MURPHEY:

24 Q. Good morning, Mr. Jones.

25 A. Good morning.

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1 Q. Your company does fire restoration work but it does not

2 build houses?

3 A. Correct.

4 Q. And insurance companies are your primary clients, is that

5 right?

6 A. Correct.

7 Q. In fact, many big insurers, I think Travelers, Zurich,

8 Aetna, is that correct?

9 A. Correct.

10 Q. And often times your company will come in and do the

11 insurance company's initial estimate of a fire loss, is that

12 right?

13 A. Correct.

14 Q. But it's also not unusual for the company to call you in

15 to give a second opinion when there might be a difference of

16 opinion regarding the estimate, is that right?

17 A. Correct.

18 Q. But it is unusual for you to become involved after the

19 appraisal process has begun, is that correct?

20 A. Unless I'm one of the appraisers.

21 Q. In fact, I think you told me before that you have very

22 limited experience with appraisals, is that right?

23 A. The formal appraisal process, yes.

24 Q. In fact, I think at your deposition you could only think

25 of one other case in which you have been involved where the

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1 appraisal process had commenced, is that right?

2 A. That's correct.

3 Q. And here you became involved after the appraisal process

4 started, right?

5 A. No, I believe that my involvement was in lieu of the

6 formal appraisal process.

7 Q. But the appraisal process, the appraisal had already been

8 demanded by the insurance carrier, it was put on hold when you

9 became involved, correct?

10 A. I'm not aware of the insurance workings.

11 Q. Okay. But you were hired by Mr. Geer?

12 A. That's correct.

13 Q. We had learned before that Mr. Geer became involved only

14 after the insurance company demanded an appraisal, you were not

15 aware of that?

16 A. No, I'm not.

17 Q. You'll agree that the ultimate goal of your estimate is

18 to provide adequate funds to restore the property to its

19 pre-fire condition without a loss in value, is that correct?

20 A. Correct. That's to provide -- that estimate would be for

21 my company to be able to accomplish that work.

22 Q. Right, and that's the goal of any estimate, right?

23 A. That's correct.

24 Q. In this business anyway?

25 A. Correct.

1 Q. In your professional opinion, it was about \$543,000 which

2 was necessary to do that, is that correct?

3 A. Correct.

4 Q. In fact, then you added about \$13,000 to that, or 11

5 maybe?

6 A. \$13,000.

7 Q. On top of that?

8 A. I think, yes.

9 Q. Now, you inspected the property in June, Mr. Schumann had

10 inspected it in February, is that right?

11 A. Yes.

12 Q. And you would agree that in all likelihood you would have

13 arrived at the same estimate in February that you did in June,

14 is that correct?

15 A. No.

16 Q. Okay. Now, is the damage that you saw in June the same

17 as the damage that was there in February?

18 A. Yes, I don't think that there were significant changes in

19 specific damage.

20 Q. But you don't believe that you would have reached the

21 same estimate in February that you did in June?

22 A. It's not likely, but it's possible.

23 Q. You recall giving your deposition in this case, correct?

24 A. Yes.

25 Q. Remember you came up to my office and I think asked you

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1 questions. Have you reviewed your deposition in preparation

2 for your testimony today?

3 A. Yes.

4 Q. Do you have a copy of the deposition with you?

5 A. No.

6 THE COURT: Why don't you just take it up.

7 BY MR. MURPHEY:

8 Q. This is a copy of your deposition transcript, Mr. Jones.

9 Can you refer to page 35 of your deposition testimony, please.

10 I'm referring to page 35, line 7 of your deposition, please let

11 me know if I'm reading this correctly. My question was,

12 "All right. So you may have come up with the same estimate

13 that you did if you had been the first estimator?" And your

14 answer was, "Correct." My next question was, "You also may not

15 have?" Your answer was, "Correct." I said "Okay." And then

16 you said "the likelihood is, is that I would have come up with

17 the same estimate because the circumstances surrounding the

18 claim I don't think would have changed greatly."

19 A. Correct.

20 Q. Was that your testimony?

21 A. Yes.

22 Q. I would also refer you to page 36 of your deposition,

23 line 15. My question began with the words "or time consulting

24 perhaps." Then I said "Was there anything about this loss

25 which you believe that the weather actually affected the amount

52

1 of damage which occurred such that your estimate would have

2 been different in June than it was in February?" Your answer

3 was "Not from a -- not from a damage standpoint."

4 A. Correct.

5 Q. Is that correct?

6 A. Correct.

7 Q. Now, you've testified that the primary differences

8 between yours and Mr. Schumann's estimate relate to the amount

9 of things in the house that you would recommend replacing

10 rather than cleaning, sealing and deodorizing, is that right?

11 A. That's correct. Can I back up, I thought we were going

12 to follow-up more with that information with regard to my

13 deposition.

14 Q. Well, Mr. Geer might have some questions for you.

15 A. Okay.

16 Q. When you testified that you recommended replacement

17 versus cleaning in this case for several reasons, and one was

18 because the home was in excellent condition, is that right?

19 A. Correct.

20 Q. And that weighs in favor of replacing more items than

21 cleaning them, is that right?

22 A. Yes.

23 Q. Okay. And there was smoke odor throughout the house,

24 that was another reason that you concluded that replacing more

25 items would be necessary rather than cleaning, sealing and

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1 deodorizing, is that right?

2 A. Correct.

3 Q. And that included smoke that was in the areas of the

4 house some distance away from where the fire started in the

5 main basement, is that right?

6 A. Correct.

7 Q. In fact, there was smoke throughout the house, including

8 the areas above the crawl space on the right side of the house

9 as we look at it from the street, is that right?

10 A. Yes.

11 Q. And you personally smelled smoke throughout the house,

12 did you not?

13 A. Yes, throughout the house is a little bit of a misnomer,

14 but yes, clearly.

15 Q. Now, you prepared a report in this case, did you not?

16 A. Yes.

17 Q. In that report you explained that there was smoke odor

18 throughout the house because of the extreme heat and the burn

19 time in the basement, is that right?

20 A. Yes.

21 Q. That hot gases were able to penetrate through the crawl

22 space and below the far end of the home and drive up into the

23 sub-surfaces and the sub-cavity via the wire holes and the duct

24 tiles, is that correct?

25 A. Correct.

1 Q. Because the hotter the fire, the greater the pressure and

2 the smaller the fire residue, correct?

3 A. That's correct.

4 Q. And that allows more extreme penetration in the cracks

5 and cavities and the areas that are difficult to clean, is that

6 right?

7 A. Yes.

8 Q. That was another reason you recommended replacement in

9 this case rather than cleaning, sealing and deodorizing, is

10 that right?

11 A. Yes.

12 Q. You also concluded that the replacement was -- because

13 the house had a handicapped accessible section to it, is that

14 right?

15 A. Yes.

16 Q. And so even if the Bordens' young daughter didn't move

17 back into the house, that's still a concern with regard to

18 putting this house back in -- putting the house back in,

19 getting the house to the same value it had before the fire,

20 correct?

21 A. Correct.

22 Q. Because it has a handicapped section, which means that

23 somebody that might buy the house later, perhaps would have a

24 sick person who was more sensitive to off gases, correct?

25 A. Yes.

55

1 Q. And I take it that it was obvious to anybody that there

2 was a handicapped accessible section of the house, is that

3 correct, that had wire doors and ramps and things like that?

4 A. Anybody that was in the construction business, sure. In

5 a cursory inspection you may not see it.

6 Q. But anybody in the construction business?

7 A. Sure.

8 Q. And then the fourth reason you identified was indeed

9 because the Bordens had a child with respiratory problems, is

10 that right?

11 A. Yes.

12 Q. Now, you said that you testified about the difference

13 between your estimate and Mr. Schumann's estimate and

14 ultimately in many of the locations where he recommended

15 cleaning, sealing and deodorizing, you recommended replacement,

16 is that right?

17 A. Yes.

18 Q. You also noted that there were some mistakes that you had
19 noticed in Mr. Schumann's estimate?

20 A. Yes.

21 Q. Do you recall those as we sit here today?

22 A. I think he mislabeled or misidentified a countertop in
23 the kitchen. I'm not sure if his estimate included a sump.

24 I don't recall if his estimate included cabinetry in the
25 basement. Other than that, I'm not entirely sure about those

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1 components, there were some missed items.

2 Q. With regard to your testimony this morning that Mr.
3 Schumann's estimate was reasonable, I think one of the reasons
4 that you said it was is because it was a preliminary or an
5 incomplete estimate?

6 A. No, I think it was reasonable in the approach that he
7 took in the estimate, which was essentially to clean a number
8 of components, as opposed to replacing them.

9 Q. I believe what you said was it was appropriate in the
10 first estimate and that you would ultimately find out as the

11 process went on whether the cleaning, sealing and deodorizing
12 would work. And then perhaps you could modify the estimate if
13 it wasn't working, is that right?

14 A. That's the typical process.

15 Q. Do you know if the Bordens were ever advised that that's
16 the typical process or that this was some sort of incomplete or
17 preliminary estimate?

18 A. I do not.

19 Q. Now, you never compared your estimate with Mr. Parise's
20 estimate in this case, did you?

21 A. No, I didn't.

22 Q. So you don't have an opinion regarding any of the details
23 of his estimate, is that correct?

24 A. Not with regard to any of the details.

25 Q. You said -- you emphasized this morning that you

1 recognized that this had become a contentious issue by the time
2 you became involved in the case, is that right?

3 A. Yes.

4 Q. I take it that Amica did not ask you to estimate the loss

5 to the most expensive replacement cost that you could justify,
6 did they?

7 A. They did not.

8 MR. MURPHEY: That's all I have, thank you, Mr.
9 Jones.

10 REDIRECT EXAMINATION

11 BY MR. GEER:

12 Q. Mr. Jones, Mr. Murphey asked you a hypothetical question
13 that you will recall regarding whether or not your estimate
14 might have been different if you had been the first estimator
15 to go in there right after the fire. I believe you wanted to
16 elaborate in one of your responses on that subject, would you,
17 please?

18 A. Yes, when I inspected the loss, it was sometime following
19 the fire. The weather conditions were good and I was able to
20 access all of the areas of the house. I had the availability
21 of two competitive estimates and details that had been gone
22 through in the house to a significant degree. I was made aware
23 of the various areas of concern and paid particular attention
24 to those areas. I was able to get into the basement. I was
25 able to get into the crawl space. I was able to have access to

1 all the areas of the home. And it was the best of situations
2 with regard to information available, having other experts that
3 had previously inspected the house and having the opportunity
4 to review their estimates, etc. Had I been the first estimator
5 on the scene and at a time shortly after the fire, I don't know
6 that all of the areas would have been accessible. I may not
7 have been able to get into the basement. I may not have been
8 able to get into the crawl space. I would not have been aware
9 of the areas of difference that had developed, that would have
10 required me to pay particular attention to those areas. And so
11 it is very likely that had I been the initial estimator on the
12 scene, that my estimate would have been different.

13 Q. What would your approach have been if a policyholder,
14 such as Dr. Borden in a case like this, came to you and said
15 I'd like you to recommend the most efficient use of my
16 insurance company's proceeds, assuming that I want to restore
17 my house to its pre-fire condition and have absolutely no odor
18 of smoke when we're done?

19 A. The best way to field a question like that is to look at

20 it and forget about insurance proceeds. Let's just say an

21 individual comes to me, they've had a fire and they want me to

22 fix it, and they're going to be spending their own money out of

23 their own pocket. I never give anybody -- basically, the job

24 that I'm going to do is that I'm going to provide them with

25 information so that, if they want to do it right, if they want

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1 to make sure that it's odor-free, structurally sound and if

2 they have to, they can resell it in original or pre-loss

3 condition. Under those circumstances what I would do is to

4 develop an estimate that would give them the items that I know

5 had been done and I would advise them of the areas that I

6 thought might be questionable. And then what I would do would

7 be I would proceed with the repairs on that basis. And I would

8 not recommend or do anything that I did not know was going to

9 be necessary initially. So from that standpoint, what I would

10 do is that I would look at the loss and a typical -- any

11 individual is going to want to accomplish the goals of

12 restoration and in the most cost-effective way. And had that

13 occurred, then that's the approach that I would have taken. We

14 do that on a regular basis. In many instances we'll get
15 involved when we have an individual that wants to get back into
16 the house as quickly as possible, wants to do a good job, we
17 will write an estimate that will outline the basic parameters
18 of the job, we'll start the demolition work, we'll complete the
19 demolition, we'll do the testing and evaluation, we'll make
20 decisions with regard to restoration throughout the process.
21 There are going to be changes. The first estimate is almost,
22 on a significant fire loss, the first estimate is almost always
23 revised in some way.

24 Q. From your experience, Mr. Jones, are these issues
25 regarding what can and cannot be cleaned, painted, remedial,

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1 issues which experts commonly disagree on?

2 A. Yes. Depending on expertise, depending on backgrounds,
3 remodelers will typically replace. They have very little
4 experience with regard to deodorization and cleaning techniques
5 and as a result they replace. Other contractors who have had
6 their origins in the cleaning business, which means, let's say
7 they started out as a cleaning subcontractor or painting

8 contractor and then they grew to be a general contractor, have
9 a stronger emphasis on cleaning and deodorization and that sort
10 of thing. Other companies that come from the construction side
11 have more of an emphasis on developing or going with the more
12 replaced construction method. There is a book out that's
13 called the National Institute of Disaster Repair Guidelines for
14 Fire and Smoke Repair --

15 MR. MURPHEY: I'm going to object, your Honor, this
16 is not part of any report that's been provided to us.

17 THE COURT: Sustained.

18 THE WITNESS: It's industry wide accepted.

19 THE COURT: I just sustained the objection, let's
20 get back to question and answer.

21 MR. GEER: He answered the question, your Honor.
22 The question was whether or not these experts commonly
23 disagree, I believe he answered. That's all I have, thank you.

24 MR. MURPHEY: If I might, your Honor.

25 THE COURT: Go ahead.

2 BY MR. MURPHEY:

3 Q. You testified about the different conditions that you
4 estimate the loss in June and Mr. Schumann did in February. Do
5 you know of anywhere in the house that Mr. Schumann did not
6 have access to when he originally estimated the loss in
7 February?

8 A. I do not, no.

9 Q. Do you have any idea what the weather was like in April
10 when Mr. Schumann was back in the house?

11 A. I do not.

12 Q. And you'll agree with me that Mr. Schumann never changed
13 his estimate at any time from February until you became
14 involved in the case, is that correct?

15 A. I'm not aware of any changes.

16 Q. You said that it's common in the industry that the first
17 estimate is revised, in fact, you said the first estimate is
18 almost always revised after being done, is that correct?

19 A. On significant fire losses, yes.

20 Q. Do you know if the Bordens were ever told that?

21 A. I do not.

22 Q. And when you estimate a loss for an insurance company and
23 then you realize you made a mistake, you described the wrong

24 type of floor, the wrong type of countertop, you revise your

25 estimate, increase it accordingly, is that right?

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1 A. Yes.

2 MR. MURPHEY: That's all I have.

3 THE COURT: Mr. Jones, I have just a couple

4 questions before we get you back on your way -- where you from

5 again?

6 THE WITNESS: Pittsburgh.

7 THE COURT: I want to make sure I got your testimony

8 correct. I think you testified that in your opinion Mr.

9 Schumann's initial estimate was reasonable, is that correct?

10 THE WITNESS: The approach that he took in his

11 estimating was reasonable. Which means the least aggressive or

12 less aggressive methods as opposed to extremely conservative.

13 THE COURT: Is your opinion in that regard based in

14 any part on an assumption that Mr. Schumann was unaware as to

15 the scope and nature of the smoke damage behind the walls?

16 THE WITNESS: No. Smoke damage behind walls can be

17 effectively cleaned, remediated, deodorized. It's possible,

18 it's likely, that on the exterior walls that were insulated,
19 that some interior finishes would have to be removed. If not
20 entire finishes on wall sections. It's also possible that only
21 portions of the exterior walls would have had to have been
22 removed. Because in a fire like that, typically the residues
23 are going to be concentrated to the lower level of the walls
24 and at wall penetrations where pipes and wires come up from
25 down below, which is where the fire originated. The insulation

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1 makes it difficult for the smoke particles to travel throughout
2 the stud cavities. And it also makes it difficult for
3 effective restoration. In wall cavities that are uninsulated,
4 that process can be very effective.

5 THE COURT: Let me interrupt you and ask you this.
6 And my question runs here, I'm trying to get a handle on this,
7 my question runs not to dollars and cents but to the scope of
8 the proposed work. And that was the major disagreement in
9 terms of smoke remediation versus replacement between you and
10 Mr. Schumann, is that correct?

11 THE WITNESS: Yes.

12 THE COURT: Now, putting aside -- I think you
13 indicated that in an earlier question, litigation concerns,
14 insurance, you're walking into this project and looking at it
15 with a clean slate. In your opinion, would it have been
16 reasonable or unreasonable for you to have suggested to the
17 Bordens that they could return their house to their pre-fire
18 condition by performing simply smoke remediation, as opposed to
19 replacement?

20 THE WITNESS: No. When you say, when you use the
21 term simply smoke remediation, as opposed to restoration, it's
22 not that simple. There is no simply cleaning versus, it's not
23 either or, it's a combination of the two. But yes, I do think
24 that it's reasonable to have told the Bordens that many of the
25 items or components in the home may successfully clean to your

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1 satisfaction, if we're allowed to do the appropriate testing
2 and procedures in order to do that.

3 THE COURT: All right, thank you, sir. Anything
4 further of this witness?

5 MR. MURPHEY: No, your Honor.

6 THE COURT: Thank you, Mr. Jones, have a safe trip
7 back to Pittsburgh. Anyone else, Mr. Geer?

8 MR. GEER: David Bennett.

9 THE COURT: All right. Mr. Bennett, you're still
10 under oath.

11 THE WITNESS: I understand.

12 DAVID J. BENNETT, DEFENSE WITNESS, PREVIOUSLY SWORN

13 DIRECT EXAMINATION

14 BY MR. GEER:

15 Q. Mr. Bennett, what is Amica's goal in a fire loss?

16 A. To promptly and fairly adjust the claim and to restore
17 the house to its pre-loss condition.

18 Q. We have spent a lot of time in this case talking about
19 some of the details and some of the problems. What I want to
20 do now is move rather briefly through some of the other things
21 Amica did in this particular case. Following the loss, did
22 Amica pay to perform emergency repairs on the premises?

23 A. Yes.

24 Q. What did Amica do?

25 MR. MURPHEY: Your Honor, I'm going to object to

1 them going through everything that they did in the case. As
2 you know, a bad faith claim is limited, Mr. Geer has just
3 introduced the topic as if they're going to go through
4 everything --

5 THE COURT: I guess I have just more of a practical
6 observation. Didn't I hear all of this in conjunction with
7 your redirecting Mr. Bennett. I mean, we're going to hear
8 about Mr. Seifert -- haven't I heard this before. I don't want
9 to cut you off, but I also don't want to plow the field twice?

10 MR. GEER: Well, I don't intend to plow a field
11 twice. I will briefly go through the various things which
12 Amica did in this case which brought the claim to a resolution.
13 It's not going to take long.

14 THE COURT: All right, go ahead.

15 BY MR. GEER:

16 Q. What were the emergency repairs that Amica paid for?

17 A. We paid for the shoring of the house, we paid for an
18 electrical pole to be brought in to provide electricity to the
19 house. There was water extraction and emergency boarding up.

20 Q. Amica provided the Bordens with a temporary residence in

21 their neighborhood, is that correct?

22 A. Yes, on the same street. We worked with a realtor to
23 reach an agreement on the cost of a rental house on the same
24 street. We arranged to have the driveways plowed and salted.
25 In addition to that, Mr. Schumann drove Mrs. Borden to a

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1 furniture store --

2 MR. MURPHEY: Again, I can cross-examine on each one
3 of these items and none of these are part of the bad faith
4 claim.

5 THE COURT: How is this germane. Actually, none of
6 these items are in dispute in terms of what they did. And this
7 is something that you're going to be able to tell me later, how
8 in a meaningful sense does Amica's initial reaction to the loss
9 and the particulars that you've just informed me, inform my
10 decision as to whether there was or was not bad faith relative
11 to what appears to be the critical issue in the case and that
12 is the appropriate scope of remediation and/or new construction
13 relative to the smoke damage?

14 MR. GEER: I believe Amica's conduct generally,

15 Amica's attitude towards insurers in the way it handles claims

16 is very much an issue here. Now, there may have been one

17 specific issue which Mr. Murphey seeks to exploit for the

18 purpose of his bad faith case. However, what this company is

19 all about, what this company has done for the Bordens, what

20 this company attempted to do, but perhaps could not do because

21 of the things which developed in the way of problems, I think

22 are all things that are germane to this case.

23 THE COURT: I'm going to overrule the objection, go

24 ahead.

25 BY MR. GEER:

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1 Q. Did Amica provide new furniture in this temporary

2 residence for the Bordens use?

3 A. Yes, we did.

4 Q. How long did Amica continue to pay for the Bordens to

5 live there?

6 A. I believe it was to March of the following year.

7 Q. Amica paid all that time?

8 A. Yes. It's typically the timeframe that you do it, is the

9 amount of time it would take to complete repairs. In this case

10 in the end they chose not to do the repairs, they demolished

11 the house.

12 Q. And Amica provided the Bordens with a claim card?

13 A. Yes. That was initially overnighted to Dr. Borden, it

14 was loaded throughout its course up to \$20,500. So within a

15 month there would have been a payment of about \$39,000 in

16 contents and payments of \$20,500 on a claim card.

17 THE COURT: Mr. Geer, we're going to take a short

18 recess.

19 (Recess from 10:45 a.m.; until 10:55 a.m.)

20 THE COURT: All right, Mr. Geer.

21 BY MR. GEER:

22 Q. Mr. Bennett, does Amica require its large loss adjuster

23 to promptly estimate the damages they can see within a fire

24 damaged property?

25 A. Yes.

1 Q. In this particular case I show you Exhibit A15, can you

2 tell me when you received the first report and estimate from

3 John Schumann?

4 A. It was received February 28, 2003.

5 Q. Upon receipt of that did you send it to the Bordens?

6 A. I believe it was left at the Bordens. I enclosed our

7 actual cash value check, I sent a copy of the estimate.

8 Q. I'm going to show you a copy of that, we've already it

9 marked as A8, ask you what date you sent the Bordens the

10 undisputed payment?

11 A. It is dated March 11, 2003.

12 Q. And what has been marked as A4, the amount of the check?

13 A. I'm sorry.

14 Q. The amount of the check was \$295,098 and change?

15 A. Yes.

16 Q. In addition to doing that, did you have Mr. Schumann

17 promptly provide you with the value of the contents which you

18 could see in the house?

19 A. Yes, he provided a partial list of the contents based on

20 the items he could identify.

21 Q. As the court's aware, you also sent the Bordens a check

22 for that?

23 A. That is dated March 17, 2003.

24 Q. And the cover letter, Exhibit A8, explaining what it was

25 for?

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1 A. It states partial contents replace cost inventory,

2 prepared by Mr. Schumann.

3 Q. All right. At some point in time you became aware of the

4 fact that Mr. Parise was the adjuster, correct?

5 A. Correct.

6 Q. He had been retained as public adjustor -- consultant by

7 the Bordens?

8 A. Yes, I had a copy of their consulting agreement, I think

9 it was March, that was March 14th, I guess.

10 Q. As of March 21st -- I'm going to show you what has been

11 marked as Defendant's Exhibit D -- I'm going to show you what

12 has not been marked before, but is now marked Defendant's

13 Exhibit D, a letter of March 21, 2003, to Mr. Parise. Is this

14 the letter in which you requested that Mr. Parise prepare a

15 contents of inventory and send you a copy of his estimate?

16 A. Yes.

17 Q. In fact, even request's a contractor's estimate if he has

18 one, correct?

19 A. That's correct.

20 Q. Did ever receive a contractor's estimate from Mr. Parise

21 or the Bordens?

22 A. No.

23 Q. Mr. Haller was in here this morning and he testified that

24 he had prepared what he called a proposal which he gave to the

25 Bordens; did you ever receive that document?

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1 A. Today was the first day that I saw it.

2 Q. You received the checks back that you had sent to the

3 Bordens, correct?

4 A. That's correct.

5 Q. Can you tell from looking at Exhibit A1 what the date was

6 that you received the check back?

7 A. That was March 25th.

8 Q. What did you do the exact same day in response to that, I

9 show you Exhibit A10?

10 A. I wrote to Mr. Parise and informed him that the check was

11 not a release of the claim.

12 Q. He could accept it as an undisputed payment?

13 A. Yes.

14 Q. You also received the contents check back, as we know, on

15 what date did you receive the contents check back?

16 A. That was March 26th.

17 Q. What did you do in response to that on the same day,

18 March 26th?

19 A. I believe I wrote another letter.

20 Q. This is Exhibit A3, and what was the content of that

21 letter?

22 A. I just referenced the March 25th letter, that neither

23 check represents a settlement check. These were payments that

24 we feel we owe based upon our adjuster's estimate of these

25 damages. I point out that your acceptance of these checks does

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1 not affect your ability to contest our estimate of the damages

2 or make a claim for additional damages.

3 Q. Now, at this point in time you had not yet received Mr.

4 Parise's estimate, correct?

5 A. That's correct.

6 Q. Perhaps they crossed in the mail, but at least as of this

7 date you didn't know what Mr. Parise's estimate was for?

8 A. That's correct.

9 Q. We are talking about March 26th, which is only what, two
10 weeks, three weeks before the April meeting?

11 A. Correct.

12 Q. All right. Now, I'm going to show you what we marked as
13 Defendant's Exhibit E, this is a letter from Mr. Parise to Mr.
14 Schumann dated March 23rd, and this indicates that he is
15 enclosing a report; to be fair, his entire estimate is attached
16 to this.

17 THE COURT: What was the date of that letter again?

18 MR. GEER: March 23rd. I'm not at this point
19 putting in Mr. Parise's estimate because it's already in there.

20 THE COURT: That's a letter to Mr. Schumann from Mr.
21 Parise?

22 MR. GEER: Dated March 23rd.

23 BY MR. GEER:

24 Q. So, Mr. Bennett, would it be safe to say that we have a
25 February 16th loss and it is actually late March, early April

1 before Amica has an estimate from any representative of the
2 Bordens which would put you on notice that they disagreed with
3 your figures, correct?

4 A. That letter that you just cited was actually sent to Mr.
5 Schumann in North Carolina. It was sometime after that that it
6 was forwarded to me.

7 Q. I'm going to show you what we're going to mark as Exhibit
8 F, which is exactly that. Please strike that, I did the wrong
9 intro on that exhibit. You received this in early April.
10 Shortly after you received this, did you receive another letter
11 from Mr. Parise requesting a meeting?

12 A. Yes, after I did receive it, I sent something to Mr.
13 Schumann asking for his review of the PA's, the public
14 adjuster's estimate and his input. It was within days that I
15 received a letter asking for us to have an actual meeting.

16 Q. So this is Defendant's Exhibit F, correct, that is
17 attached to Mr. Parise's letter of April 6th. It says at the
18 beginning, a formal response to your letter dated March 11th,
19 March 17th and March 25th, correct?

20 A. Correct.

21 Q. And it is in this letter dated April 6th that Mr. Parise

22 goes on in detail explaining the differences and disagreements

23 he has, correct?

24 A. That's correct.

25 Q. At this point in time, did you consider the Schumann

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1 estimate to be final or preliminary?

2 A. No.

3 Q. At this point in time, were you --

4 THE COURT: I don't understand the answer, had to be

5 one or the other?

6 THE WITNESS: I answered no to first the part, I

7 considered it a preliminary estimate.

8 BY MR. GEER:

9 Q. At this point in time, were you trying, was your object

10 in sending these checks to the Bordens to settle the claims at

11 that number?

12 A. The whole intent of that is to get the money that we feel

13 that we owe them, the amount that we know we owe them in their

14 hands. We don't want to hold the money, we want them to hold

15 the money.

16 Q. Is it or is it not an attempt to reach a final settlement

17 based upon those numbers?

18 A. No.

19 Q. How does the normal process work?

20 A. Normally speaking, an insured will select a contractor

21 that is actually going to do the repairs. Like I said before,

22 I was never made aware of a contractor. And then if repairs

23 were underway or if there are issues that are developed during

24 the course of repairs, that sometimes you have to re-evaluate

25 the method of repair. It happens all the time with auto

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1 repairs. It always happens.

2 Q. Had the Bordens selected a contractor or at least

3 provided you with a name of a contractor that they were relying

4 upon, how could this have facilitated the resolution of the

5 claim issues?

6 A. Well, at the time we had the meeting, at that point I had

7 an adjuster's estimate, one that the company had used many

8 times before, an adjuster they used many times before, we had

9 Brian Seifert, who had written to me and told me he could do

10 repairs as outlined by Mr. Schumann's estimate. I know there's

11 an issue about Mr. Seifert's position about that. But after

12 the meeting Mr. Seifert told me a completely different story

13 about his initial meeting with Mr. Parise and he reinforced to

14 me that he thought the work could be done based on Schumann's

15 estimate. If there had been another contractor in there, I

16 think it would have affected how I evaluated the situation.

17 Q. Regardless of what went on at the meeting of April 15th,

18 I certainly don't want to go through everything that occurred

19 again. However, so the court doesn't feel that nothing was

20 accomplished at that meeting, let me ask you this. Were there

21 aspects of the claim which were discussed at the April 15th

22 meeting which were involved at that meeting -- can you answer

23 the question?

24 A. Well, I believe at that point --

25 MR. MURPHEY: Objection, your Honor, that was posed

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1 before, this matter is not an issue.

2 THE COURT: Overruled.

3 THE WITNESS: I believe that one of the reasons why

4 we felt that it was best to proceed with the appraisal process

5 is the condition of the house at that point by April 15th, it

6 was getting quite warm. Nothing other than the emergency

7 services that were provided had been done to the house, there

8 was mold growing on the wall. I mean the situation wasn't

9 getting any better.

10 BY MR. GEER:

11 Q. Was there an agreement reached at the April 15th meeting

12 regarding the clothing?

13 THE COURT: Regarding what?

14 BY MR. GEER:

15 Q. The clothing, the dry cleaning?

16 A. Yes, in addition to the dwelling, we did review the items

17 that were dry cleaned, and at that point I believe there was an

18 agreement with Mr. Parise and myself that some of the items did

19 need dry cleaned, some didn't. I requested him to complete an

20 inventory of those items that didn't.

21 Q. All right. In addition to the issues regarding the dry

22 cleaning, there were also issues discussed regarding the

23 contents of the house which were being removed and needed to be

24 cleaned so that they could hopefully be preserved, is that

25 correct?

1 A. That's correct.

2 Q. Was anything resolved there?

3 A. Well, I think Mr. Parise's position throughout the whole
4 process were none of the items were ever going to be accepted.

5 But we --

6 MR. MURPHEY: For the record, your Honor, same
7 objection.

8 THE COURT: Overruled. So the record is clear, when
9 I'm overruling these objections, I'm going to make a final
10 determination when I review this transcript as to exactly how
11 and where this all fits together. So, go ahead.

12 BY MR. GEER:

13 Q. I'm going to show you an exhibit, Mr. Bennett, that we
14 have not introduced, the May 7th letter, I have marked it as
15 Exhibit G. This is the letter to Mr. Parise from you, I'm
16 going to ask you look at the first paragraph. If this kind of
17 summarizes some of the things which were discussed at the
18 meeting, let the court see what the status was on these other
19 issues. First of all, the first paragraph says "this will

20 confirm our discussions at the April 15th meeting." The second
21 one says "we agreed there were items that did not dry clean or
22 launder appropriately. You agreed to include these items in
23 your contents inventory. We also agreed there were items that
24 did clean," is that safe to say?
25 A. That's correct.

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1 Q. So there were agreements reached, correct?

2 A. Yes.

3 Q. You're also asking for contents inventory, and discuss
4 the mold issue, correct?

5 A. Correct.

6 Q. And you also say here in our meeting as discussed because
7 of a large variation of the estimated damage, this would move
8 forward most expeditiously to be resolved through appraisal,
9 correct?

10 A. Correct.

11 Q. And the court has already seen a copy of the letter which
12 you submitted to the Bordens and Mr. Parise, this is A13, which
13 sets forth the appraisal provision, correct?

14 A. That's correct.

15 Q. This is where you formally demand an appraisal. Did

16 Amica continue, after demanding an appraisal, still look for

17 ways to resolve the claim?

18 A. Yes, we did.

19 Q. And Amica found out, did it not, that the Bordens, who

20 had hired counsel, felt there was another way to go, short of

21 appraisal, and that was to request a meeting where another

22 contractor be present, correct?

23 A. That's correct.

24 Q. And that was Dan Jones?

25 A. That's who we hired, yes.

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1 Q. The claim was eventually settled based upon Mr. Jones'

2 estimate, correct?

3 A. That's correct.

4 Q. Now, as we sit here today, the Bordens never moved passed

5 what I call the actual cash value stage -- have they received

6 all the actual cash value payments on their home which are due

7 to them?

8 A. For the dwelling, no. Oh, I'm sorry, the actual cash

9 value, yes, they did, I'm sorry.

10 Q. And under the Amica policy, they are also entitled to

11 replacement cost, are they not?

12 A. That's correct.

13 Q. What do they have to do in order to obtain the

14 replacement cost?

15 A. We have an agreement that if they purchase a house or

16 rebuild a house in excess of the agreed upon repairs, we will

17 issue the ACV hold back, the amount of depreciation that was

18 withheld.

19 Q. A lot of discussion in this case has involved what is the

20 replacement cost, but in fact they really haven't qualified to

21 receive that yet, have they?

22 A. No.

23 Q. Nevertheless, there is an agreement between Amica and the

24 Bordens which sets forth what that replacement cost is,

25 correct?

1 A. Correct.

2 Q. And that is the number that Dan Jones came up with,

3 correct?

4 A. Yes.

5 Q. I'm going to show you one more document, Exhibit H, and

6 this is the policyholder release, acknowledgement of payment

7 and settlement agreement which was entered into in this

8 particular case.

9 MR. MURPHEY: What is the date of Exhibit G?

10 MR. GEER: May 27th.

11 MR. MURPHEY: Thank you.

12 BY MR. GEER:

13 Q. Exhibit H is the release -- you will note, Mr. Bennett,

14 that it was signed in April, were the terms of this release

15 worked out at the end of the year 2003?

16 A. Yes.

17 Q. Payment was made, correct?

18 A. Correct.

19 THE COURT: This was signed in April in 2004?

20 THE WITNESS: Yes.

21 BY MR. GEER:

22 Q. Does Exhibit H set forth the payments which had been made

23 up to that point in time?

24 A. That's correct.

25 Q. Is that accurate?

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1 A. Yes.

2 Q. So, ultimately, as far as you know, in terms of achieving

3 Amica's goal of putting the Bordens back in pre-fire condition,

4 obviously, you couldn't rebuild the house because they elected

5 to demolish it. In terms of what it cost to do that, do you

6 feel Amica has done that?

7 A. Yes, I do.

8 MR. GEER: That's all I have, thank you.

9 THE COURT: Mr. Murphey.

10 MR. MURPHEY: I just have a couple of things, your

11 Honor, because I've already examined Mr. Bennett.

12 CROSS-EXAMINATION

13 BY MR. MURPHEY:

14 Q. You testified briefly about things that happened

15 initially after the fire, including Amica's payment for a

16 rental house for the Bordens. It was actually the Bordens that

17 located the rental house, is that right?

18 A. Yes, and we worked with his realtor.

19 Q. That was the obligation of Amica's under the alternative

20 living expense section of the policy, correct?

21 A. That's correct.

22 Q. And the claim card that you spoke is a way in which Amica

23 satisfies its obligations to provide replacement of damage

24 contents, clothes and that sort of thing and do it in an

25 efficient way after loss, is that correct?

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1 A. It's money they can use in any way.

2 Q. And you testified about that in this case, Mr. Schumann

3 at one point told the Bordens that although they had reached a

4 limit on the claim card, it would be reloaded and then when

5 Mrs. Borden tried to use it, it was twice rejected because it

6 hadn't been reloaded, is that correct?

7 A. It's a debit card, it depends on how much --

8 Q. Did that happen, sir?

9 A. I believe that allegation took place. But I don't have

10 any documentation in the claim card report that it actually

11 took place.

12 Q. But you know that was reported?

13 A. It was reported, yes.

14 Q. Just some miscellaneous things really. You said today

15 that you had never seen Mr. Haller's estimate until today, is

16 that correct?

17 A. That's correct.

18 Q. Do you know that Mr. Geer took Mr. Haller's deposition

19 last year and at that deposition Mr. Haller produced his

20 estimate, you know that?

21 A. I was not given the estimate.

22 Q. You just didn't see it, okay. Now, you testified a

23 minute ago that Mr. Parise sent you a letter dated March 23rd

24 with his estimate, obviously, you got it a few days after that,

25 correct?

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1 A. It was after that, I don't remember the number of days.

2 Q. Sure. You testified just a minute ago that was your

3 first notice that Mr. Parise had estimated the loss at

4 something greater than Mr. Schumann, is that correct?

5 A. I don't recall that, I'm sorry.

6 Q. Because, in fact, you knew as early as March 5, 2003,
7 that Mr. Parise had estimated the loss and that the estimate
8 was going to be significantly greater than Mr. Schumann's
9 estimate, didn't you?

10 A. My understanding was, from looking at Schumann's time
11 sheets, that they were contesting the claim.

12 Q. Okay. In fact, we saw, we heard testimony before that
13 from Mr. Schumann's time sheet that it was as early as February
14 27, 2003, that the Bordens were questioning the scope of Mr.
15 Schumann's estimate, is that right?

16 A. That's correct, but they never provided us with any
17 documentation in support of that argument.

18 Q. Okay, but a minute ago you told the judge that you didn't
19 have any notice of it, I just want to make sure that he doesn't
20 misunderstand that you did have notice of it?

21 A. I had no documentation.

22 Q. Okay. March 5, 2003, I'm showing you the document that's
23 been previously marked as Exhibit 3-13, this is an e-mail from
24 you to Ms. St. Onge, is that correct?

25 A. That's correct.

1 Q. The sentence under coverage A says, "I have been informed
2 the insured has retained a public adjuster/consulting firm."
3 And then further down in the first paragraph, it says that
4 "Visions said the consultant says dwelling estimate will be
5 double what he wrote," is that correct?

6 A. That's correct.

7 Q. And, of course, Visions never did write an estimate, is
8 that right?

9 A. No.

10 Q. Now, you testified that normally a contractor would be
11 selected who would do the repairs and you described what you
12 seen in other cases. But you will agree with me, will you not,
13 that Amica's obligation is the same, and that is to pay
14 whatever it would cost to put the house to pre-fire condition
15 regardless of whether the insured actually chooses to rebuild,
16 is that right?

17 A. That's correct, it doesn't facilitate the process.

18 Q. Okay. In this case ultimately the Borden's never did
19 rebuild, is that correct?

20 A. That's correct.

21 Q. So you dispute the obligation is still the same?

22 A. Yes.

23 Q. Correct?

24 A. Correct.

25 Q. Now, Mr. Geer referred to Exhibit G. This is Exhibit G

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1 that you looked at minute ago, which is the letter of May 7,
2 2003, and in that letter in the second paragraph you tell Mr.
3 Parise that "we agreed there were items that did not dry clean
4 or launder appropriately. You agreed to include these items in
5 your contents inventory. We also agreed that there were items
6 that did clean." Now, at this point you're agreeing, I think
7 you testified about this before, that you personally had
8 examined the dry cleaning and found some of them had not
9 cleaned, is that right?

10 A. Correct.

11 Q. Now, this is after, however, you had sent a letter to the
12 Bordens before you ever saw any of the dry cleaning, in which
13 you had insisted that the cleaning had been done adequately and
14 they should accept the clothes, is that correct?

15 A. Yes, that was based upon a representation from VIP

16 Cleaners to me.

17 Q. Okay. What I'm referring to is this letter which is

18 marked Exhibit 3-19, dated March 25, 2003, in which at the

19 bottom you say, "according VIP Cleaners, these items have been

20 cleaned according to industry standards and we disagree with

21 the contention that they were not cleaned satisfactorily," is

22 that correct?

23 A. That's correct.

24 Q. And later when you actually saw them you agreed that some

25 of them were not?

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1 A. Some of them were not, in the end we paid for them all.

2 Q. And Mr. Geer finished by asking you about whether the

3 Bordens had ever received their replacement cost money. They

4 have not because they haven't rebuilt yet. You explained the

5 agreement. But, again, that does change Amica's obligation, is

6 that correct?

7 A. Correct.

8 MR. MURPHEY: That's all I have, thank you.

9 THE COURT: Do you need a document, Mr. Geer?

10 MR. GEER: Yes.

11 THE COURT: Which one is it?

12 MR. GEER: It's one of the letters --

13 THE COURT: What is the subject matter, maybe I can
14 help you?

15 MR. MURPHEY: We'll stipulate to the fact that Amica
16 was told that Dr. Borden was researching carcinogens and they
17 never got anything in writing. Which I think is what Mr. Geer
18 is asking for.

19 MR. GEER: That's exactly what I'm asking.

20 REDIRECT EXAMINATION

21 BY MR. GEER:

22 Q. You received a letter from Mr. Parise indicating that Dr.
23 Borden was researching information regarding carcinogens and it
24 would to be provided to you at some later date. You never
25 received that, is that correct?

1 A. No, I did not.

2 Q. Have you ever received any information indicating that

3 smoke remediation process and fire restoration process, which
4 was being contemplated in the Schumann estimate, was going to
5 be in a way harmful to anybody in the Borden family?

6 A. No, I did not.

7 Q. Did you receive any information during the claim stage
8 which would have indicated that the smoke remediation process
9 would not have restored the Borden home to its pre-fire
10 condition?

11 A. No, I did not.

12 THE COURT: What was the timeframe on that last
13 question again?

14 MR. GEER: During this claim stage, did you ever
15 receive any information --

16 THE COURT: What is the claim stage, what is the
17 period of time?

18 MR. GEER: While the claim was open.

19 THE COURT: Anytime from the filing up to the
20 settlement you mean?

21 MR. GEER: Yes.

22 THE COURT: Go ahead, ask the question.

23 BY MR. GEER:

24 Q. The question was did you receive any information which
25 would indicate the Schumann technology, the smoke remediation

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1 process, would not have worked, would not have left the house
2 in its pre-fire condition?

3 A. No, I did not.

4 MR. GEER: That's all I have.

5 THE COURT: Do you have anything else?

6 MR. MURPHEY: No, your Honor.

7 THE COURT: All right, Mr. Bennett, thank you very
8 much. Is that it then from your standpoint, Mr. Geer?

9 MR. GEER: What I have, your Honor, in addition to
10 that, I have very short couple sections from the deposition of
11 Richard Borden. What I have done is just taken, it's really
12 only four pages, I've circled the sections --

13 THE COURT: I should have asked the same question of
14 Mr. Murphey, the deposition excerpt of Lisa St. Onge, which is
15 Exhibit 14, has that been filed?

16 MR. MURPHEY: It has not, your Honor.

17 THE COURT: It should electronically be filed and be

18 made part of the record. Have all these other exhibits been

19 electronically filed and made part of the record?

20 MR. MURPHEY: They have not.

21 THE COURT: They all should be.

22 MR. MURPHEY: When will we do that, just post-trial?

23 THE COURT: I'll talk about the logistics of that in

24 a second. And I presume the same for you, none of your

25 exhibits have been made part of the record, is that right?

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1 MR. GEER: Maybe a few that were attached to

2 pleadings, but that's it. I think the release maybe. For the

3 most part, no.

4 THE COURT: Similarly, you can give me the hard copy

5 of what you have in your hand there, how is that identified?

6 MR. GEER: We will identify this as Exhibit I.

7 THE COURT: Well, for present purposes, just give it

8 to Ron and we'll get a paper clip, we'll staple it. And that's

9 whose deposition?

10 MR. GEER: Richard Borden, who is the brother of Dr.

11 Borden. He's the one that was providing the legal advice early

12 on.

13 MR. MURPHEY: I think these are the same sections
14 that he had identified for me previously.

15 THE COURT: Is there anything else?

16 MR. GEER: That's all, your Honor. Other than my
17 exhibits. I'm going to need a second just to organize them.

18 THE COURT: In terms of what I want both of you to
19 do, in terms of filing, I want you to both prepare, you move
20 them in, but it's going to be helpful to actually have a formal
21 document from each of you. I want you, Mr. Murphey, or someone
22 on your behalf prepare seriatim a list of your exhibits, a
23 brief description of them, also for filing. That my clerk can
24 easily refer to as we're working on this case.

25 MR. MURPHEY: Just a cover page with a list of

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1 exhibits attached?

2 THE COURT: That's right. The same for you, Mr.
3 Geer. Do you need some time to go through and look at your
4 exhibits?

5 MR. GEER: I need a second. I have them in various

6 places.

7 THE COURT: All right, you don't have to do that
8 right now, you can do that in a bit. For present purposes, if
9 both of you are so inclined, and I think it's always helpful
10 for me at the end of a non-jury case, to hear what if anything
11 each of you would have to say by way of summary. Mr. Murphey.

12 MR. MURPHEY: Yes, your Honor. I know your Honor
13 has been very actively involved in the testimony and that you
14 clearly understand and have followed the evidence. And, in
15 fact, I'd like to thank you for allowing both Mr. Geer and I to
16 sort of argue as we went along and put things in context. So
17 I'm not going to give a summary like I would to a jury, I know
18 you would appreciate that.

19 I think, your Honor, that we have proven all the
20 suggested findings of fact that we submitted, that is really
21 what we tried to do, is go down that list and we've proven all
22 of them, either by oral testimony or by the exhibits that are
23 being submitted to you. As you know, we are required to prove
24 by clear and convincing evidence two things. One, that the
25 carrier was unreasonable; and two, the carrier knew or should

1 have known it was acting unreasonably. In this case on issue
2 one, and that is whether Mr. Schumann's initial estimate was
3 unreasonable, I don't think there can be any question that it
4 was.

5 THE COURT: Let me interrupt you because if memory
6 serves me, this may be wrong, I thought your position was not
7 that Mr. Schumann's initial estimate was evidence of bad faith,
8 but that once Mr. Schumann was advised or became possessed of
9 Mr. Parise's opinion, that it was at that point that his
10 continued adherence blossomed into bad faith?

11 MR. MURPHEY: Well, that's true. But there's two
12 elements to bad faith. The first one is the unreasonable
13 conduct to begin with. Our position is that Mr. Schumann's
14 estimate was unreasonably low. And then at various times
15 during the course of the claim, Amica was provided with
16 information that should have been, should have let them know
17 that it was unreasonable to rely on Mr. Schumann's estimate.
18 But I think in the first instance we have evidence that the
19 estimate was too low. And that evidence is that anybody else
20 that's looked at this case, has estimated it at significantly
21 more than Mr. Schumann. The closest other estimate is Mr.

22 Jones, which is \$213,000 more than Mr. Schumann's. Of course,
23 Mr. Parise's was more than twice Mr. Schumann's. Mr. Haller's
24 is more than twice of Mr. Schumann's. So on the insular issue
25 of whether Mr. Schumann was reasonable with his estimate to

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1 begin with, we think that we proved beyond a shadow of a doubt
2 that it was not. In fact, Mr. Jones, who came in and actually
3 changed his testimony today slightly, actually more than
4 slightly, he said today that he felt his estimate, if he had
5 done it initially for the insurance company in February, it may
6 have been different from Mr. Schumann's. And he explained why
7 that is. But in his deposition he said the opposite. He said
8 in all likelihood my estimate would have been the same as Mr.
9 Schumann's if I done it in February.

10 The damage aspects of the case haven't changed.
11 They attempt to talk about how Mr. Schumann may have been
12 operating under difficult circumstances, of course, we know his
13 estimate never changed. We have never been provided any
14 information that Mr. Schumann, Mr. Schumann didn't testify that
15 there was some specific area of the house he couldn't get to,

16 that there was something about the damage that for whatever
17 reason he couldn't see. Of course, in April he goes back and
18 sees the house, walks through it in what we presume is good
19 weather conditions and he doesn't change his estimate. But on
20 the insular issue of whether Mr. Schumann's estimate in the
21 first instance was unreasonable, we think that the evidence is
22 overwhelming. Mr. Seifert doesn't help --

23 THE COURT: Was it recklessly unreasonable or was it
24 negligently unreasonable to begin with?

25 MR. MURPHEY: To begin with it's negligently

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1 unreasonable.

2 THE COURT: All right. But I want to understand
3 your position. Is it your position that that is simple
4 negligence, which will not support a bad faith claim, at some
5 point on the time continuum blossoms, if you will, into a
6 reckless indifference once he becomes possessed of the other
7 expert's opinion and the basis for it, is that essentially your
8 claim?

9 MR. MURPHEY: That's it, your Honor. So Mr. Parise

10 provides an estimate, a detailed estimate, it concludes and as
11 we just heard from Mr. Bennett, they knew as early as March
12 5th, the fire was February 16th -- well, I take it back, they
13 knew as early as February 27th that the Bordens disagreed with
14 the scope of the estimate. They knew as early as March 5th
15 that Mr. Parise significantly disagreed with the scope of the
16 estimate. They ultimately get Mr. Parise's report at the end
17 of March. They still don't do anything. Mr. Parise suggests a
18 meeting. They didn't suggest a meeting, Mr. Parise did. They
19 have the meeting, they walk through the house, at that time
20 it's just overwhelming, the evidence, that Mr. Schumann's
21 estimate was way, way too low. Mr. Schumann or Mr. Parise now
22 is showing them in spades the problems with the smoke residue
23 inside the walls. He goes to the extreme, actually probably a
24 little theatrical, of kicking holes in the walls and showing
25 them soot. We saw all the photos, I know you don't need to see

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1 them again.

2 THE COURT: Let me ask you this. At that point or

3 shortly -- it's your opinion that, first of all, is it, in your

4 view, is it evidence of the carrier's bad faith that they
5 demand an appraisal?

6 MR. MURPHEY: Yes, your Honor.

7 THE COURT: Why is that?

8 MR. MURPHEY: Because, your Honor, appraisal is,
9 we've heard testimony from people today that an appraisal is
10 unusual, it's a method of last resort, it's expensive for the
11 insured, and there's no reason why they couldn't have a
12 contractor come in and look at the estimate, re-estimate it if
13 they didn't feel like -- if they felt that the gap was too
14 great to bridge at that point. They attempted to force the
15 insured to an appraisal, inconsistent with their own
16 guidelines, by the way. Their own guidelines - are the insured
17 is to have the option of invoking the appraisal process. If
18 they chose not to, then they can take some other measure to try
19 to resolve the dispute or invoke an appraisal themselves. The
20 bottom line is they attempted to invoke the appraisal, they
21 decided to invoke the appraisal procedure at that point without
22 doing any negotiating or conceding, and in fact at that time
23 Mr. Bennett and Mr. Schumann agreed between the two of them
24 that their estimate should be increased by at least \$20,000.

25 They didn't offer that, they didn't revise the estimate, they

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1 simply said let's go to appraisal.

2 It was only after Dr. Borden complained to the

3 insurance company and counsel got involved, that the appraisal

4 process slowed down and ultimately never occurred because

5 another contractor got involved. If you remember at the

6 outset, I asked your Honor to look at this case as if the

7 Bordens hadn't been represented, what would have happened.

8 Well, at that point if they hadn't been represented at all,

9 they would have gotten \$328,000 ultimately and that's more than

10 \$200,000 less than they admitted that they owed.

11 THE COURT: Aside from the issue of the scope of

12 work, which is one of the important issues here, what am I to

13 make of the fact that in any event there was a rather -- there

14 was a huge difference in dollars and cents between the Parise

15 estimate and the Schumann estimate?

16 MR. MURPHEY: Well, Amica's obligation is to pay

17 what they owe when they know that they owe it. And at the time

18 of the April 15th meeting, they knew they owed more than they

19 offered. And they didn't revise an offer, they didn't make any

20 supplemental payment.

21 Consider the mind set of the Bordens at this point.

22 Mr. Schumann has been provided, Mr. Schumann and Amica, because

23 Mr. Bennett was at the meeting, too, had been provided clear,

24 clear evidence of mistakes and omissions in that Schumann

25 estimate and it's not revised. For example, you've heard

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1 testimony about the countertops. The difference between

2 plastic laminate and Corian countertops, is that individually

3 an important item, maybe not. However, it indicates to the

4 Bordens that Amica has no intention of revising Mr. Schumann's

5 estimate at any time. Mr. Parise has crawled under and shown

6 them the Corain sticker. Did they change their estimate to

7 increase significantly the payment for the countertops, no.

8 Same goes for the floor. He had estimated vinyl flooring, it

9 was tile flooring. And this is information that had been

10 provided to Mr. Schumann before, and they make no revisions.

11 THE COURT: Let me ask you this, then you can tell

12 me whatever else you want to tell me. If, as a matter of fact,

13 as it played out in the real world, we know an appraisal never

14 took place?

15 MR. MURPHEY: That's right.

16 THE COURT: If Mr. Jones had -- Mr. Jones being the

17 contractor, not obviously Terry Jones, the lawyer, if Mr. Jones

18 had been retained by Amica within a week or so of their initial

19 request for an appraisal, as opposed to several weeks later

20 after some further -- how much later was he retained after the

21 April meeting?

22 MR. MURPHEY: The estimate was done at the end of

23 June, but he went on vacation, they didn't actually get an

24 estimate until later, middle of June.

25 THE COURT: Let's presume rather than Jones being

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1 brought on a couple months down the road, Jones was brought on

2 in an effort to resolve the claim within a week or 10 days.

3 Would you still be making the argument that there was bad

4 faith?

5 MR. MURPHEY: Yes, your Honor.

6 THE COURT: Why and I'm not saying this was or

7 wasn't, I have no fixed opinion, I'm going to read this

8 transcript. But, you know, the old phrase no harm, no foul;

9 where is the harm and foul here?

10 MR. MURPHEY: Well, the only reason Amica did that
11 was because Mr. Borden complained to the insurance department
12 and Dr. Borden got counsel. And it was only after that, and
13 then Amica retained counsel. It was only after that that Amica
14 changed counsel and decided to get another contractor involved
15 in the case, who ultimately allowed the case to be resolved.

16 We said at the outset that this is not a traditional
17 delay case, in the sense that they knew that they owed X amount
18 on January 1, 2000 and paid it in 2003. This is a case where
19 the Bordens were compelled to take steps that they shouldn't
20 have had to take in order to get the amount that they were
21 legitimately owed under the policy. Those steps were to hire
22 the public adjuster, complain to the insurance department, hire
23 a lawyer. And it was only then that Amica and perhaps once Mr.
24 Geer got involved, it was only then that Amica said well, wait
25 a minute, we don't have a contractor's estimate in this case,

1 we recognize that when were at the meeting of April 15th, Mr.
2 Parise showed us that there was significant soot throughout the
3 house, including behind the walls, maybe we need to take a
4 another look at this rather than pushing toward to an appraisal
5 where perhaps the insurance company would do better than what
6 they actually owed under the policy.

7 THE COURT: What in your view am I to make of the
8 testimony in this case concerning the reasonableness or lack
9 thereof of attempting to remediate smoke damage through the
10 various techniques that have been discussed, as opposed to
11 ripping the thing down to the studs?

12 MR. MURPHEY: Mr. Jones, again, said today that he
13 changed his --

14 THE COURT: Wasn't Mr. Jones somewhat unequivocal on
15 the point?

16 MR. MURPHEY: I thought Mr. Jones made it very clear
17 in his deposition and then when I cross-examined him, I hope
18 your Honor agrees with me, he said that if he had looked at
19 this estimate in February, it would have been the same as he
20 did it in June. He would not have estimated it in the fashion
21 that Mr. Schumann did. He's now trying to help his client,
22 he's testifying with respect to what maybe another contractor

23 would have said, another supposedly reasonable contractor, but
24 Mr. Jones himself wouldn't have done it. I thought he was very
25 equivocal on the question you asked, and that is what would you

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1 have recommended at the time. He kind of went back and forth
2 on that. I think, with all due respect to Mr. Jones, I think
3 he went back and forth because when he originally testified, he
4 acknowledged to me damage hasn't changed in any way. Amica
5 didn't ask me to do anything other than estimate what it would
6 cost to put this house back in pre-fire condition. That's what
7 I did. And my estimate is \$542,000. Mr. Schumann's is
8 \$320,000. My scope is the same as Mr. Parise's. As Mr.
9 Bennett acknowledged, Mr. Jones' testimony or report was much
10 more consistent with Mr. Parise's than it was with Mr.
11 Schumann's. So the testimony is could these things be used in
12 another case. Maybe your Honor was happy to learn about some
13 of this technology, but nobody said it would have worked in
14 this case. Including Mr. Jones and their own witness, with
15 respect to Mr. Schumann's estimate.

16 THE COURT: Anything else you want to tell me?

17 MR. MURPHEY: No, your Honor.

18 THE COURT: Thank you. All right, Mr. Geer.

19 MR. GEER: Thank you, your Honor. There are a
20 number of things here which have been pretty much
21 uncontradicted. One is the fact that reasonable people differ
22 and reasonable experts differ on smoke remediation technology.
23 And when it can be used and when it cannot be used.

24 THE COURT: Let me ask you a question. And my
25 memory is not sufficient at the present time to permit me to

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1 say whether this testimony is or is not contradicted by Mr.
2 Schumann. My recollection is that I think it may not be. What
3 if anything should I make of what may prove to be a fact,
4 unless I have to do some fact finding or maybe stipulated, not
5 stipulated, but uncontested fact, that Mr. Schumann was of the
6 opinion at the house that -- or expressed the opinion at the
7 house, and I'm paraphrasing it, how do we know that this soot
8 came from this fire, do you recall the testimony?

9 MR. GEER: I recall him, my recollection is Mr.
10 Schumann said he recalls something of that nature.

11 THE COURT: Was that reasonable -- was that a
12 reasonable speculation under the circumstances?

13 MR. GEER: Well, your Honor, he might have said
14 something which was not prudent to say under the circumstances,
15 if he in fact said it, I would agree with that. I don't think
16 there's any question that meeting did not go well. Mr. Parise
17 was walking around kicking holes in walls, Amica wasn't sure if
18 they didn't need to be destroyed, he was in fact damaging them
19 by doing that. That meeting didn't go well.

20 THE COURT: What am I to make of the testimony about
21 the tub and the engine, if you will, or the machinery that ran
22 the tub. The testimony to the effect that Mr. Parise was --
23 indicating how the tub could not be repaired. I think I even
24 asked a question about the engine, whether that was an integral
25 part. And no response. Is it the carrier's position now or

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1 was it the carrier's position then that Mr. Schumann's approach
2 to that jacuzzi was the appropriate one?

3 MR. GEER: The carrier's position is that Mr.
4 Schumann missed it. Mr. Schumann made a mistake, he didn't

5 look under the tub, he should have looked under the tub. He
6 should have seen that it was damaged. He did not identify the
7 proper amount of damage underneath the tub. It wasn't aware of
8 this until the April 15th meeting.

9 THE COURT: I take it in evaluating the carrier's
10 good faith or bad faith here, notwithstanding Mr. Schumann's
11 status as an independent contractor, if you will, I am
12 entitled, am I not, to consider the reasonableness or
13 unreasonableness of Mr. Schumann's actions?

14 MR. GEER: I believe you are, your Honor. What we
15 would request that you do is that you consider the reasonable
16 or unreasonableness of the comments or something that was said
17 in the heat of the moment, in the context of what was going on
18 with the whole claim.

19 What was going on in the whole claim at this stage
20 was no final settlement offer had been made. Mr. Murphey's
21 case, all the arguments are being made in this case based upon
22 a preliminary estimate. There is not a scintilla of evidence
23 in this case indicating that Amica was trying to settle the
24 claim, settle everything based upon this preliminary Schumann
25 estimate. It was preliminary. Everyone said that it was

1 preliminary. It was sent to them, they disagreed with it.
2 When checks were sent based upon this estimate, undisputed
3 checks, they rejected them. When they got a letter saying
4 these are undisputed, they still wouldn't accept them. In
5 response to Mr. Murphey's argument, which that they needed a
6 public adjuster, they needed an attorney to deal with this, I
7 say this. Certainly everyone can make their own decision as to
8 whether or not to get a public adjuster in a case.

9 In the Borden's case, there was a lot to be done
10 here. You need to go through a huge house, a mansion, you need
11 to find out everything that was damaged. And the contents
12 alone, it would be a prohibitive job. But I can certainly
13 understand why they might want a public adjuster to do this and
14 to get help on the building. However, that is not something
15 that is caused by anything that Amica did. They retained Mr.
16 Parise in early March. At that point in time, maybe they had
17 decided they were very uncertain about the Schumann estimate,
18 but I'm not even sure they knew why, they just were not
19 familiar with the insurance process.

20 I think one of the issues that comes up in every
21 case is what harm was done and whether or not the damages the
22 plaintiffs' requested are really related to anything the
23 insurance company did. I guess there's a couple responses to
24 that. For one thing, when they retained Mr. Parise, this loss
25 was a couple weeks old. And with respect to the comment I had,

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1 he charged them an eight percent fee for being a consultant.
2 He was paid over \$70,000 to basically put their claim together
3 and submit it. And they are trying to pass that on to Amica.
4 They had agreed to pay that before there were really any
5 problems. Certainly the Bordens didn't know they were going to
6 agree with the Schumann estimate. But the point is where can
7 there be bad faith where there have been only preliminary
8 discussions. The Bordens are essentially saying to the court
9 because and Parise was saying this in his testimony, because
10 they didn't do it my way, I don't think they acted properly.
11 Because at the April 15th meeting they didn't agree with
12 everything I said --

13 THE COURT: Let me ask you this. Once again I'm

14 drawing a distinction between dollars and cents and the scope
15 of the work, although they are somewhat inextricably tied. Is
16 it by the close of the meeting on April -- what was that, April
17 15th?

18 MR. GEER: April 15th.

19 THE COURT: By the close of the meeting on April
20 15th, does the record reflect that Amica was or was not of the
21 opinion that the appropriate way to deal with the smoke damage
22 was to tear down the walls, as opposed to attempt to remediate
23 the smoke in the various fashions?

24 MR. GEER: I don't believe there was any record,
25 anything in the record which would indicate that at the close

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1 of the meeting on April 15th Amica believed it was wrong in the
2 approach that the walls, the smoke remediation process could
3 work. Amica was aware that Schumann had missed things in his
4 estimate, but not relating to that. But the overriding thing
5 that was going on at this point in time was that Amica had
6 already given the Bordens over \$335,000 and the money had been
7 returned. The court had no evidence in this case that the

8 Bordens delayed rebuilding because of these issues. This is
9 all kind of something in a vacuum. Because they've given the
10 Bordens \$335,000, why would they think that another check for
11 \$20,000 would make a difference. And it was very obvious at
12 this meeting that Parise's at \$690,000 and Schumann's at
13 \$328,000 and all the testimony is it didn't appear they could
14 bridge that gap. And what Amica sought to do here was get a
15 resolution of the process.

16 And I totally disagree with Mr. Murphey that there
17 was any evidence, either the insurance commissioner letter or
18 the appraisal provision, had anything to do with a bad faith
19 issue here. Now, appraisal, Amica could have lost the
20 appraisal. But it was a prompt way of resolving this. Both
21 sides hired an impartial, competent person, they come in and
22 take a second look. There is certainly no evidence which would
23 indicate, as Mr. Parise said, this would have cost the Bordens
24 10 grand or whatever. Mr. Haller could have served as their
25 appraiser. There is evidence that Amica went out and tried to

1 retain Jack Owens, who's a large loss adjuster out of McKean,

2 Pennsylvania. They could have gotten this thing done very
3 quickly and who knows whether it would have been the same
4 number as that number that Dan Jones came up with.

5 The point really is that Amica was not a company
6 here that was only going to do it its way. The preliminary
7 estimate of John Schumann was challenged, it was challenged by
8 Parise's estimate. It was not challenged by the contractor's
9 estimate. The Bordens did not bring in a contractor that said,
10 Amica, you can't do it at this price. It was a public adjuster
11 writing a high estimate. Someone who has an eight percent fee
12 at stake here, the more he recovers, the more he gets paid.
13 And it's certainly his job to recover as much he can for the
14 Bordens.

15 Amica has a somewhat different idea. They wanted to
16 get the house in its pre-fire condition, they didn't want to
17 waste insurance dollars doing it. So Amica's response to this
18 is let's try to find a way to resolve this. Certainly an
19 appraisal cannot be in bad faith when it is requested promptly.
20 I've been involved in cases where the insurance company, where
21 one party or another requests an appraisal two years down the
22 road and then the bad faith allegation comes up.

23 But in this case, it seems to me what the Bordens

24 want to do, no matter what way Amica moves, they're going to
25 allege bad faith. They say it's bad faith to request an

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1 appraisal. They said it was bad faith because Jones came up
2 with a number between Parise and Schumann, but closer to
3 Parise. In fact, he was \$140,000 below Parise and the Bordens
4 agreed to it. There is no evidence in the case that they would
5 have agreed to that number at the April 15th meeting. The
6 Jones' resolution was, what I call the Jones' resolution, was a
7 willingness by Amica to listen, when Terry Jones, the attorney
8 for the Bordens, suggested they bring in a second contractor
9 rather than go to appraisal, Amica agreed to put the appraisal
10 on hold and they listened and they did what the Bordens wanted
11 to do, because they thought it might help resolve things.
12 Ultimately, that's what happened.

13 All the issues and all the evidence that Mr. Murphey
14 has cited in this case is all about something that was in the
15 preliminary stage of the claim. These were all actually steps
16 towards getting the claim adjusted, getting it resolved and
17 getting the release complete.

18 THE COURT: All right, I think I have your point,
19 thank you. You've got to get your exhibits together, is that
20 right?

21 MR. GEER: Yes, your Honor.

22 THE COURT: How long is that going to take you?

23 MR. GEER: Five minutes, maybe ten.

24 THE COURT: I'll come out in a few minutes. As a
25 general proposition --

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1 MR. GEER: I have them together. I just want to
2 check to make sure I didn't miss anything.

3 THE COURT: You start looking at them, I'll start
4 giving you some other directions. Within 20 days of the
5 receipt of the transcript in this case, which one or both of
6 you I'm sure will be ordering or a combination, I want the
7 plaintiffs', for lack of a better term, supplemental proposed
8 findings of fact and conclusions of law, which both sides, of
9 course, will now have the benefit of having a real record to
10 work from. And then within 20 days of the filing of the
11 plaintiffs' proposed findings, I would want the defendant's

12 proposed supplemental findings of fact and conclusions of law.

13 MR. MURPHEY: Your Honor, would it be more helpful

14 to you to redo all the findings of fact, so there's one

15 document or do you want the ones we filed pretrial and then a

16 supplement?

17 THE COURT: Put it this way. It doesn't much matter

18 to me what you call them --

19 MR. MURPHEY: I would assume your clerk would want

20 one document to work off of.

21 THE COURT: Put it this way. The initial proposed

22 findings were for me an anticipatory road map of where each

23 party thought the case was going to go, but primarily to help

24 me follow the evidence, because it gave me something to read in

25 advance. In terms of the significance, I would have to say

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1 that these are your real proposed findings of fact and

2 conclusions of law. For purposes of my utilization and my

3 clerk's utilization, it will be these, since they're based on

4 the record, that is going to drive the resolution of the case.

5 I think we talked when we were in chambers about attorney's

6 fees issues, things like that. There was a conclusion that is
7 all premature pending a determination one way or the other on
8 the liability. So I don't need to see anything in there from
9 the plaintiff on that. Similarly, I don't need to see anything
10 in the proposed findings about punitive damages, that's a
11 damage issue, also, which can await. Nor do I need to see
12 anything about any other aspect of damages, including
13 compensatory damages. Those issues we will address when and if
14 we have to get to them. Are you still kind of looking through
15 your exhibits there?

16 MR. GEER: Yes.

17 THE COURT: I'm just going to sit here so I don't
18 have to come back out and go to lunch.

19 MR. GEER: Let me go through everything except the
20 photographs, and then I will go through the photographs. The
21 first one is Exhibit C, the Jones' estimate.

22 THE COURT: Is that Defendant's Exhibit C?

23 MR. GEER: Yes.

24 THE COURT: All right.

25 MR. GEER: Exhibit A5, which is the February 18th

1 letter from Mr. Bennett to Dr. Borden.

2 Exhibit A7, which was a Visions Corporation letter

3 to Schumann, Amica and Dr. Borden.

4 June 5th, a letter to Paul K. Geer from Attorney

5 Jones, Exhibit A12.

6 Defendant's Exhibit A6, a letter from David Bennett

7 to Dr. and Mrs. Borden, dated March 3rd. All these are 2003.

8 Exhibit A13, a letter dated May 2, 2003 to Dr. and

9 Mrs. Borden, from David Bennett.

10 Exhibit G, a letter to Anthony Parise, dated May 7,

11 2003, from David Bennett.

12 Exhibit H, the policyholder release acknowledgment

13 of payment and settlement agreement.

14 Exhibit A8, the March 11th letter to Dr. and Mrs.

15 Borden from David Bennett.

16 Exhibit A4, this is a copy of front and back of the

17 check dated March 11, 2003, for the building damage in the

18 amount of \$295,098.92.

19 Exhibit A8, a letter to Dr. and Mrs. Borden from

20 David Bennett dated March 17th.

21 Exhibit A9 --

22 MR. MURPHEY: Excuse me, you've identified two A8's.

23 MR. GEER: Let's go with A8(1), I'll put one in

24 parenthesis. The March 17th letter would be A8(1).

25 A9 is the March 17th check, front and back, with the

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1 endorsement on it for the undisputed contents payment in the

2 amount \$39,945.48.

3 Defendant's Exhibit D is the March 21st letter to

4 Anthony Parise from David Bennett.

5 Defendant's A1 is a copy of the handwritten note to

6 David Bennett from Amy Borden rejecting the check.

7 Exhibit A10 is the March 25th letter to Anthony

8 Parise from David Bennett.

9 Exhibit A2 is the second note to Mr. Bennett from

10 Jonathan and Amy Borden, dated 3/20/03.

11 Exhibit A3 is the March 26th letter to Dr. and Mrs.

12 Borden from David Bennett.

13 Exhibit E is the March 23rd letter to John Schumann

14 from Mr. Parise.

15 Exhibit F is the 8/4/03 memo to John Schumann from

16 David Bennett, enclosure for the Giordano letter of April 6th

17 of 2003. Letter to Mr. Bennett from Mr. Parise.

18 Exhibit I are the excerpts from the Richard Borden

19 transcript.

20 THE COURT: Let me ask you a question. The big

21 books, trial exhibits volume one, volume two and volume three,

22 those are of course yours?

23 MR. GEER: Yes.

24 THE COURT: One is just the policy guidelines and

25 the others are various exhibits with various times frames. And

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1 of course I open them up and go through them. Each of the

2 documents has a defendant's sticker on the exhibit, but it's

3 not numbered?

4 MR. GEER: That's correct. I attempted to put them

5 in order but we didn't use them all.

6 THE COURT: Okay. So what you're doing now is you

7 are supplying numbers to some of these that are in the book?

8 MR. GEER: Practically, here's what happened. These

9 were prepared weeks ago. After all these were all prepared and
10 assembled, Mr. Murphey and I discussed limiting some of the
11 issues which were going to be before the court in this
12 proceeding. At that point in time it is unclear as to what
13 exhibits would be needed -- but many of those are not in
14 evidence and will not be used.

15 THE COURT: I'm going to give you back those trial
16 books, but I'll tell you what you can do. First of all, are
17 you done going through your exhibits?

18 MR. GEER: No, I'm not.

19 THE COURT: All right, finish that up.

20 MR. GEER: Exhibit A-15 is the February 25th report
21 and estimate from John Schumann.

22 The rest are photographs, all of which have been
23 marked as letter P. Each of the photographs has a number
24 besides it, I'm just going to read the number of each one
25 should have a P in front of it.

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1 THE COURT: All right.

2 MR. GEER: The numbers are 186. 42. 95. 96. 88.

3 1. 8. We have a second 1 -- I'm sorry, that's 3. 85. 110.

4 112. 113. 118. 117. 123. 124. 128. 130. 132. 133.

5 134. 135. 45. 83. 84. 25. 26. 59. 60. 121. 122. 41.

6 80. 81. 37. 35. 192 and 191.

7 THE COURT: Those are all admitted. Is that it?

8 MR. GEER: That's it, your Honor.

9 THE COURT: What I want you to do then, as I said

10 before, both of you within a week, I think a week would be

11 sufficient, file your exhibits electronically, number one,

12 along with the cover sheet with their number and a description.

13 That's number one. Number two, what I want you to do, Mr.

14 Geer, is within the next couple of weeks, I want you to send to

15 me a new folder that has the exhibits as they really exist and

16 have been admitted. Because these are not, through no fault of

17 your own, will not be helpful to me. Send that directly to

18 chambers. Now, the books that you have given me, they've all

19 been admitted?

20 MR. MURPHEY: They have, your Honor.

21 THE COURT: I have 1, 2, 3 -- I have a book marked

22 10, Exhibit 10.

23 MR. MURPHEY: Hang on a second, I'm sorry, your

24 Honor. There should be a photo binder, which is number 1. The

25 estimates which are number 2. The claim file exhibits, which

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1 is number 3. The Parise photos, which are number 10.

2 THE COURT: Weren't their loose exhibits, too, you

3 gave me?

4 MR. MURPHEY: Yes.

5 THE COURT: 11. 4. 6A. 12. 13, is that right?

6 MR. MURPHEY: Well, there's several others.

7 THE COURT: 14. These were loose.

8 MR. MURPHEY: There should be 5, 6, 8 and 9.

9 10, I have another copy.

10 THE COURT: Let me make sure I don't already have
11 them up here. I have 4, 11, 6A -- let me see those other ones,
12 for some reason I don't apparently have them. I just received
13 Exhibits 8 and 9. What am I missing, 5 and 6, whatever they
14 are?

15 MR. MURPHEY: Five is the insurance policy. I think
16 this is the way it was put in. I believe a copy was handed up
17 at that time, I have another copy. 5 and 6 I handed up. Then,
18 your Honor, you said you have 11?

19 THE COURT: Yes. So then I don't need that from
20 you, I already have all your exhibits. Every exhibit that I
21 have, either loss or in a binder, you have now moved and have
22 been admitted, is that right?

23 MR. MURPHEY: That's right, your Honor. I went down
24 that list of 14 and the binders were included.

25 MR. GEER: Your Honor, I have a few that I omitted.

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1 THE COURT: All right, what are those?

2 MR. GEER: Those are P-179, 180, 181, 182, 183, 184,
3 187, 188 and 190, these are all exterior views of the home.

4 THE COURT: All right, those are admitted. Those
5 will be part of your exhibit list. When you submit your
6 exhibit list, do it in order, if you will, 1 through or A
7 through. That will make it easier. I'm going to put this in
8 the box over here. Those are the trial exhibits that you had
9 given to me, would you can take back. Does anybody have any
10 questions -- all right, we're all done.

11

12 (Whereupon, at 12:05 p.m., the Non-Jury Trial

13 proceedings were concluded.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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12 _____

13 Ronald J. Bench

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